UNIVERSITY of WISCONSIN LAW SCHOOL

July 2020

TO: Subscribers to Wisconsin Jury Instructions - Criminal

FROM: University of Wisconsin Law School, Continuing Education and Outreach

Enclosed is Release No. 58 for the 1980 edition of Wis JI-Criminal and an invoice for payment. The release contains material approved by the Wisconsin Criminal Jury Instructions Committee through June 2020.

The following material is included in Release No. 58:

New Instructions		Revised Instructions		
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Questions. If you have any questions about the subscription procedure, this release, or the criminal jury instructions project in general, please direct them to Bryce Pierson at the address below. For billing inquiries, please contact the Law School at 608-262-3833 or email Joanne Fitz at joanne.fitz@wisc.edu.

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Wis JI-Criminal

(Release No. 58 – July 2020)

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WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME I

Wisconsin Criminal Jury Instructions Committee

University of Wisconsin Law School

[Cite as Wis JI-Criminal]

• Includes Release No. 58

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Information About This Publication

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ISBN 978-0-578-54637-7 (5-volume set)

Citing this publication: Cite this publication as: Wis JI-Criminal

For information about this publication: Please contact UW Law School, 975 Bascom Mall, Room 2348, Madison, WI 53706-1399; Telephone: 800-355-5573; 608-262-3833

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* ***Jury Instructions on CD-Rom***. *The jury instructions in this publication (and in* ***Wisconsin Jury Instructions-Civil*** *and* ***Wisconsin Jury Instructions-Children****) are available in Microsoft® Word or as PDF on CD-Rom for convenient, time-saving preparation of jury instructions for trial. The Committee's commentary is not contained on the electronic versions. To order the CD-Rom, see the order information above.*

WISCONSIN
JURY
INSTRUCTIONS
CRIMINAL

Prepared for the Wisconsin Judicial Conference by its Criminal Jury Instructions Committee, consisting of Hon. D. Todd Ehlers, chair; Hon. Maureen Boyle; Hon. Jane Carroll; Hon. William Domina; Hon. Thomas Eagon; Hon. Scott Horne; Hon. Nicholas McNamara; Hon. Mitchell Metropulos; Hon. Michael Moran; Hon. Frederick Rosa; Hon. Stephanie Rothstein; with assistance from Assistant Attorney General Annie Jay, Assistant State Public Defender Jefren E. Olsen; and Professor Emeritus David E. Schultz and Bryce Pierson, University of Wisconsin Law School.

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Published by
University of Wisconsin Law School
Continuing Education and Outreach

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(Rel. No. 58—7/2020)

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INTRODUCTION

[This introduction was approved in 2018. It condenses and combines the introductory and prefatory material that was previously published, and updates that material.]

The Wisconsin Jury Instructions-Criminal is the product of a cooperative effort between the Criminal Jury Instructions Committee and the University of Wisconsin. The partnership began in 1960 with an informal agreement between the University of Wisconsin-Extension, Department of Law, and the Board of Criminal Court Judges, then the parent body for the Committee. In 1978, the Wisconsin court system was reorganized and the old statutory boards, including the Board of Criminal Court Judges, were abolished. The Criminal Jury Instructions Committee was reconstituted as a standing committee of the Criminal and Traffic Section of the Wisconsin Judicial Conference. In 1986, the University of Wisconsin-Extension, Department of Law, was integrated with the University of Wisconsin Law School as its Office of Continuing Education and Outreach. In 2016, that office was renamed Continuing Education and External Affairs. Despite the structural changes in both the courts and the University, the cooperative effort has continued without interruption.

The project's origin is related to the adoption of a new Wisconsin Criminal Code in 1956 and several of the original Committee members and advisors had been leaders in that undertaking. The Board of Criminal Court Judges concluded that the newly-defined crimes required new jury instructions and that it was no longer sufficient to rely on instructions that may have been passed along informally from judge to judge. The Introduction to the 1962 Edition explained:

> The Wisconsin Board of Criminal Court Judges, realizing that no ready reference work was available to assist the bench and bar in the preparation of jury instructions in criminal cases, authorized and directed [the Committee] . . . to study the problem and submit to the Board such suggested instructions as, in the Committee's opinion, would assist judges and trial lawyers in the submission of criminal cases to juries.
>
> These were the Committee's principal objectives:
>
> 1. To prepare instructions that would accurately and concisely state the law in a way that would be meaningful and helpful to the jury.
> 2. To make readily available such instructions as a trial judge would likely need in the trial of a criminal case to a jury.
> 3. To revise instructions that had been in general use prior to the enactment of the Criminal Code of Wisconsin, which became effective July 1, 1956, and to make such changes

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therein as seemed to be advisable as a result of such enactment; and, generally, to relate the instructions to the new Criminal Code.

4. To make certain that all such instructions were in conformity with the decisions of the Wisconsin Supreme Court.

Introduction To The 1962 Edition – Judge Gerald Boileau, Chairman Committee on Jury Instructions – Criminal

When the first edition was published in 1962 it was dedicated to the Committee's first chair, Circuit Judge Gerald Boileau from Wausau.

DEDICATION

The following resolution was unanimously passed by the Wisconsin Board of Criminal Court Judges at its annual meeting in June of 1961:

> WHEREAS, the Hon. Gerald J. Boileau has been the only Chairman of the Board's Committee on Criminal Jury Instructions, and;
>
> WHEREAS, the monumental work of this Committee, which will ultimately lead to the publication of model instructions for the use of this State, is due largely to the untiring and dynamic leadership of the Hon. Gerald J. Boileau, and;
>
> WHEREAS, the Hon. Gerald J. Boileau has in the past made significant contributions to the advancement of his profession in that he has been Chairman of the Wisconsin Board of Circuit Judges, Chairman of the Wisconsin Board of Criminal Court Judges, a member of the Judicial Council of this State for many years, and Chairman of the Criminal Code Advisory Committee which drafted the new Criminal Code in its final version;
>
> Be it therefore, resolved, that when Wisconsin Jury Instructions – Criminal is published, it be dedicated to the Hon. Gerald J. Boileau in recognition of his interest, his advice, and his time so freely given to his profession.

Expectations for how the instructions should be used were set out in the Preface to the original edition and remain accurate today.

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Unlike instructions drafted for the purpose of a particular case, each instruction was, necessarily, drafted to cover the particular rule of law involved without reference to a specific fact situation. While the general instructions and the instructions on defenses and defensive matters may frequently be used without change, instructions on the substantive offenses may often have to be modified to fit the needs of the particular case. The user, therefore, should consider each instruction a model to be examined carefully before use for the purpose of determining what modifications are necessitated by the facts of the particular case. In addition, the effect of the instructions upon each other must be considered. When, for example, conspiracy or solicitation is submitted, it may be necessary to modify the instructions.

It is suggested that the comment and the footnotes be read fully and carefully before the instruction is used, in order that the user be informed of any conditions prerequisite to its use, alternative material for particular cases, and of other cautionary information. Words and phrases which are to be used alternatively appear in parentheses and italics. Words and phrases which are not appropriate to every case, but which should be given in some situations, are in brackets. Editorial directions which alert the user to alternatives or to the need to insert material or other instructions are found in brackets in the body of the instruction or in the comment.

The book itself may be cited as "Wis JI-Criminal" and each instruction by adding the appropriate number. . . . It is suggested, however, that these instructions be referred to by their citations only when the user requests that the instruction be given verbatim. If the attorney modifies one of these instructions, it is requested that he point out the nature of the change and the reason therefore.

PREFACE TO THE 1962 EDITION
John H. Bowers, Editor

As mentioned, several of the original members and advisors had strong ties to the development of the 1956 Criminal Code. The original judge members were:

Hon, Gerald J. Boileau, Wausau, Chairman
Hon. Herbert J. Steffes, Milwaukee
Hon. William E. Gramling, Waukesha
Hon. Milton L. Meister, West Bend
Hon. Clarence Whiffen, Racine
Hon. Henry Gergen, Beaver Dam [replaced Judge Whiffen in 1961]

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The original advisory members were two outstanding criminal law experts: Assistant Attorney General William A. Platz and Professor Frank J. Remington. In speaking about them, the 1966 foreword stated: "The Committee could have found no better qualified individuals than William Platz and Frank Remington for technical advisors. Suffice it to say that the aid of these two men has been invaluable."

William Platz's contributions were further described in an in memoriam tribute published in 1980:

> William A. Platz had no peer in the field of criminal law. For nearly four decades, he was counsel to every district attorney and every law enforcement officer in the State of Wisconsin, always available and willing, cheerfully, to give advice. And no more knowledgeable, trustworthy help was available anywhere.
>
> He possessed not just a singular knowledge and devotion to the justice system but a keen wit and fine sense of humor as well. His wit and wisdom forever remain with all who knew this fine outstanding man.

Frank Remington's efforts were recognized in the foreword to the 1966 supplement:

> Frank Remington has such impressive credentials in the field of criminal law that we need not spell them out here. He was one of the principal researchers on the massive revision of the Wisconsin Criminal Code. As a member of the Law School faculty since 1949, he has been specializing in the study of criminal law. He has brought nationwide distinction to the Law School as a center for research and teaching in criminal law and the administration of criminal justice.

John H. Bowers was the original editor/reporter for the publication. The Introduction to the 1980 Edition recognized his contributions:

> The Committee has been fortunate to have the services of John H. Bowers, Attorney at Law, Madison, and former Deputy Attorney General, State of Wisconsin, as reporter and editor from 1961 through 1976. During that time John was responsible for most of the reporting and drafting chores. His services over the years have been of the greatest importance.

Although the original conception of the project may have anticipated that the Committee would finish its work once the new Criminal Code was addressed, that proved not to be the case. After the publication of the original edition in 1962, supplements were published in 1966, 1967, 1971, 1974, and 1976. A new edition was published in 1980,

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increasing the page size of the hard copy to 8 1/2 by 11 from the original 6 by 9. As of July 2019, 57 supplements have been published to the 1980 edition.

Inquiries and suggestions from judges and lawyers are among the most important sources of new business for the Committee. It is always informative to receive questions and suggestions from those the Committee is trying to serve. You are encouraged to contact the reporter by phone, mail, or e-mail, or to consult with any member of the Committee. Copies of approved-but-not-published material are available from the reporter, as are working drafts.

A list of all judges who have served on the Committee and a list of advisory members and editors is provided beginning on the following page. Current members and advisors are listed on the title page.

Criminal Jury Instructions Committee

Bryce Pierson, Reporter
University of Wisconsin Law School
975 Bascom Mall, Room 2340
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The Criminal Jury Instructions Committee
Members and Advisors

Judges

Gerald Boileau	Marathon Co.	1960-1975 [Chair: 1960-1975]
William Gramling	Waukesha Co.	1960-1976
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50 PRELIMINARY INSTRUCTION: JURORS' CONDUCT; EVIDENCE; TRANSCRIPTS NOT AVAILABLE; CREDIBILITY; SUBSTANTIVE ISSUES; OPENING STATEMENT

Before the trial begins, there are certain instructions you should have to better understand your functions as a juror and how you should conduct yourself during the trial.

Your duty is to decide the case based only on the evidence presented at trial and the law given to you by the court. Anything you may see or hear outside the courtroom is not evidence. Do not let any personal feelings about race, religion, national origin, sex, or age affect your consideration of the evidence.

Do not begin your deliberations and discussion of the case until all the evidence is presented and I have instructed you on the law. Do not discuss this case among yourselves or with anyone else until your final deliberations in the jury room. This order is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social networking sites, to send or receive any information about this case or your experience as a juror.

We will stop, or "recess," from time to time during the trial. You may be excused from the courtroom when it is necessary for me to hear legal arguments from the lawyers. If you come in contact with the parties, lawyers, (interpreters) or witnesses do not speak with them. For their part, the parties, lawyers, (interpreters) and witnesses will not contact or speak with the jurors. Do not listen to any conversation about this case.

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Do not research any information that you personally think might be helpful to you in understanding the issues presented. Do not investigate this case on your own or visit the scene, either in person or by any electronic means. Do not read any newspaper reports or listen to any news reports on radio, television, over the internet, or any other electronic application or tool about this trial. Do not consult dictionaries, computers, electronic applications, social media, the internet, or other reference materials for additional information. Do not seek information regarding the public records of any party or witness in this case. Any information you obtain outside the courtroom could be misleading, inaccurate, or incomplete. Relying on this information is unfair because the parties would not have the opportunity to refute, explain, or correct it.

Do not communicate with anyone about this trial or your experience as a juror while you are serving on this jury. Do not use a computer, cell phone, or other electronic device, including personal wearable electronics, applications, or tools with communication capabilities to share any information about this case. For example, do not communicate by telephone, blog post, e-mail, text message, instant message, social media post, or in any other way, on or off the computer.

Do not permit anyone to communicate with you about this matter, either in person, electronically, or by any other means. If anyone does so despite your telling them not to, you should report that to me. I appreciate that it is tempting when you go home in the evening to discuss this case with another member of your household, but you may not do so. This case must be decided by you the jurors, based on the evidence presented in the

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courtroom. People not serving on this jury have not heard the evidence, and it is improper for them to influence your deliberations and decision in this case. After this trial is completed, you are free to communicate with anyone in any manner.

These rules are intended to assure that jurors remain impartial throughout the trial. If any juror has reason to believe that another juror has violated these rules, you should report that to me. If jurors do not comply with these rules, it could result in a new trial involving additional time and significant expense to the parties and the taxpayers.

You are to decide the case solely on the evidence offered and received at trial.

EVIDENCE [WIS JI-CRIMINAL 103]

Evidence is:

First, the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness.

Second, the exhibits the court has received, whether or not an exhibit goes to the jury room.

Third, any facts to which the lawyers have agreed or stipulated or which the court has directed you to find.

OBJECTIONS [ADD WIS-JI-CRIMINAL 148 IF DESIRED]

NOTETAKING [ADD WIS-JI-CRIMINAL 55 OR 56 IF DESIRED]

QUESTIONS BY JURORS [ADD WIS-JI-CRIMINAL 57 IF DESIRED]

TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY [WIS JI-CRIMINAL 58]

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You will not have a copy of the written transcript of the trial testimony available for use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced during the trial.

POLICE REPORTS [ADD WIS JI-CRIMINAL 59 IF DESIRED]

CREDIBILITY OF WITNESSES [WIS JI-CRIMINAL 300]

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;

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- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

SUBSTANTIVE INSTRUCTIONS – ELEMENTS OF THE CRIME

BURDEN OF PROOF [ADD WIS JI-CRIMINAL 140 IF DESIRED]

OPENING STATEMENTS [WIS JI-CRIMINAL 101]

The lawyers will now make opening statements. The purpose of an opening statement is to give the lawyers an opportunity to tell you what they expect the evidence will show so that you will better understand the evidence as it is introduced during the trial. I must caution you, however, that the opening statements are not evidence.

COMMENT

Wis JI-Criminal 50 was originally published in 1991 and revised in 1995, 1999, 2001, 2003, and 2009. This revision was approved by the Committee in June 2020; it expanded on the use of social media and other digital tools.

The 2009 revision added cautions regarding use of computers, cell phones and other electronic communication devices and about communicating via blogs, e-mail, text messages, etc. See page 2. The Committee tried to integrate those cautions into the broader concerns addressed by the instruction: deciding the case only on the basis of evidence introduced at trial, not communicating with others about the case while it is pending, and not making up one's mind until all the evidence is in. Communication by jurors after the trial is concluded, whether or not by electronic means, is covered by the general rule that jurors may, but are not required to, discuss their jury service with anyone. See Wis JI-Criminal 525.

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The Michigan Supreme Court has adopted a rule requiring judges to instruct jurors not to use electronic communication devices during trials. See, Amendment of Rule 2.511 of the Michigan Court Rules, June 30, 2009, ADM File No. 2008-33.

This instruction as originally published dealt only with juror conduct during the trial. The 1999 revision added the material relating to defining "evidence," credibility, substantive instructions, and opening statements. These are matters that, in the Committee's judgment, are most typically included in the preliminary instructions. Adding other general material or giving fewer instructions than recommended here are matters within the discretion of the individual trial judge. Practice apparently varies as to repeating the instructions included here as part of the final instructions in the case. The Committee concluded that the instructions defining the offense and the instruction on the burden of proof should always be included in the final instructions.

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550 SOLICITATION AS A CRIME — § 939.30

Statutory Definition of the Crime

The crime of solicitation, as defined in § 939.30 of the Criminal Code of Wisconsin, is committed by one who, with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has that intent.

The defendant in this case is charged with advising that the crime of (name of felony) be committed. (Name of felony) is a felony.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intended that the crime of (name of felony) be committed.

   The crime of (name of felony) is committed by one who

   [DEFINE THE CRIME INVOLVED, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE][1]

2. The defendant advised another person, by the use of words or other expressions, to commit the crime of (name of felony) and did so under circumstances that indicate, unequivocally, that the defendant intended that (name of felony) be committed.

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"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts.[2]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 550 was originally published in 1962 and revised in 1994 and 2000. The 2000 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment. The Comment was revised in April 2019. A "Reporter's Note" was removed in 2020.

This instruction is for the inchoate crime of solicitation, as defined in § 939.30. Liability as a party to crime under § 939.05, based on "soliciting" another to commit a crime, is addressed by Wis JI Criminal 415.

Solicitation under § 939.30 is a Class D felony, with two exceptions: solicitation to commit a crime punishable by life imprisonment is a Class C felony; solicitation to commit a Class E felony is punished as a Class E felony. See § 939.30(2).

In State v. Yee, 160 Wis.2d 15, 465 N.W.2d 260 (Ct. App., 1990), Yee asked Dino Corti to find someone who would break the arms and legs of Mr. Li and later kill him. Corti informed the police and Yee was arrested. The court of appeals reversed the trial court's dismissal of solicitation charges, holding: "if A, with intent that a felony be committed, advises B to procure C to commit the felony under circumstances which indicate unequivocally that A has such intent, A is guilty of the crime of solicitation, contrary to sec. 939.30. . . ." 160 Wis.2d 15, 16.

In State v. Manthey, 169 Wis.2d 673, 487 N.W.2d 44 (Ct. App. 1992), Manthey, a potential witness in a malpractice action, indicated to the plaintiff's husband that she would testify favorably only if paid by the plaintiff. The court of appeals applied the Yee rationale to this case, which did not involve a "C":

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". . . Manthey advised Otis to engage in the commission of the crime of perjury when she offered to commit perjury if he paid her. The Yee rationale, therefore, does not require the existence of 'C'." The court referred to this type of case as one involving a "double inchoate crime." 169 Wis.2d 673, 687.

In State v. Boehm, 127 Wis.2d 351, 379 N.W.2d 874 (Ct. App. 1985), Boehm solicited Larry Poor to murder Ron Hitchler. Before anything was done, she told Poor that she was "done with" the killing and called the whole thing off. The court of appeals held that a defense of renunciation or withdrawal does not apply to the crime of solicitation under § 939.30:

> Renunciation or withdrawal cannot undo that which has been done and therefore has no effect on the elements of solicitation, once completed. Renunciation or withdrawal therefore cannot be a defense to the completed crime of solicitation, in the absence of statute.

In State v. Kloss, 2019 WI App 13, 386 Wis.2d 314, 925 N.W.2d 563, Kloss solicited his wife to shoot a gun through the front door if any police officers returned to their house. The State charged Kloss with one count of solicitation of first-degree reckless injury, Wis. Stat. § 940.23(1)(a). Kloss was convicted and appealed, arguing in part that it is not possible for a person to intend that another person succeed in causing great bodily harm by reckless conduct because whether harm will result from the other person's reckless conduct is entirely unpredictable. The court of appeals held that a solicitor can intend at the time of the solicitation, that great bodily harm result from the solicitee's reckless conduct. While the uncertainty of whether an injury will in fact result from the solicitee's conduct at the time of the solicitation is "inescapable in an inchoate crime such as solicitation," no level of certainty is required to form a purpose to cause a particular result. Kloss, 386 Wis.2d 314, 322 (2019).

1. If the instruction on the intended crime involves considerable elaboration, it may aid jury understanding to move this description to the end of the instruction, immediately preceding the "Jury's Decision" paragraphs.

2. This is the definition of "unequivocally" used in Wis JI-Criminal 580, Attempt.

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700 Law Note: Theory Of Defense Instructions; Instructing The Jury On Defensive Matters

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Scope

This Law Note outlines the legal standards for submitting a "theory of defense instruction" and discusses issues relating to instructing on "defensive matters."

Conceptually, there are two types of "defenses":

- an "affirmative defense" recognizes a basis for avoiding criminal liability based on facts that are not inconsistent with – that is, can be present at the same time as – the elements required by the offense definition.[1]

- a "negative defense" [preferably "failure of proof" defense] is based on facts that are inconsistent with an element required by the offense definition and therefore prevent that element from being proved.[2]

This Law Note discusses the procedures for making these defenses an issue in the case, the constitutional and state law principles that apply, and the methods of presenting the defenses to the jury.

I. Theory Of Defense Instructions

A. The Standard

A request for an instruction on the "theory of defense" must be granted when: it relates to the legal theory of a defense as opposed to the interpretation of the evidence urged by the defense, and it is supported by the evidence, and, it is not adequately covered by the other instructions in the case.

These principles were originally discussed in State v. Davidson, 44 Wis.2d 177, 170 N.W.2d 755 (1969). The Davidson statement has been cited often in later cases,[3] but it has not been substantially improved upon. The Davidson court stated:

> Defendant next claims as error the failure of the trial court to give a proposed instruction, the so-called "theory of the defense" instruction. On this point it is important to distinguish between the legal theory on which prosecution or defense relies and the factual evidence adduced in support of such theory. In the case before us, the proposed "theory of defense" instruction submitted by the defense appears to be a summarization of the evidence as the defense sees it. In fact, the defendant's counsel in their brief define a "theory of defense" instruction as ". . . the defendant's theory of the case is a recitation of the facts upon which he relies and the inferences which can reasonably be drawn from these facts." This commingles an explanation as to legal theory with comments on the evidence by the trial judge. The majority of cases cited by defendant on this point are from the federal system, where comments on the evidence may be made by the trial judge. In Wisconsin, trial judges are not to thus comment on the evidence. Such comment

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even in the form of a statement that these are the assertions of the defense, is not allowed in Wisconsin.

It is true that the legal theory of prosecution and defense is presented to juries in this state in general instructions, in the reading of the information, and in special defensive instructions such as those relating to self-defense, insanity, etc. It can be prejudicial error for a trial judge to fail to instruct on a special defense if the evidence raises that issue. This relates to the legal theory, not a factual summary. In the instant case, the legal theory of the defense was adequately covered by the instructions. The defendant entered a general plea of not guilty, putting the state to its proof. The trial judge instructed the jury on the fact of such not guilty plea having been entered, the burden of proof resting upon the state, the presumption of innocence, the necessity of the state proving each element of the crime charged, and the duty of the jury to acquit if they did not believe and find him guilty beyond a reasonable doubt. This was adequate coverage of the legal theory of the case of the defendant.

44 Wis.2d 177, 191-92

B. It Must Be A "Legal" Theory of Defense

The right to an instruction on the theory of defense is a right to have the jury instructed on the law. Thus, the Davidson case refers to the "legal" theory of defense. Examples that clearly fit this category are the defenses recognized by the Wisconsin statutes or by case law.

The requested instruction must correctly state a principle that is recognized as a defense to the crime charged. For example, a requested instruction on the defective condition of an automobile was properly refused as not stating a defense to the charge of operating under the influence.[4]

The distinction the Davidson case tries to make is between a "legal theory" and the "factual evidence adduced in support of such a theory." The court held that parties are not entitled to instructions that provide a factual summary of the evidence relied on. For example, the following constitute factual summaries[5] rather than statements of a legal theory:

- "The defendant's theory of defense is that while he acknowledges the fact that he did enter Sanders Collision Service and that he did not have the permission of the owner or occupant, he had no intent to steal before or at the time of entry. He has contended that he entered the building because of the weather and his sleepiness or drunkenness; that he only decided to take liquor after seeing it while he was lying down on the floor. Thus, he says that a necessary element of the crime of burglary does not exist in this case."

- "The defendant's theory of defense is that he was neither involved in the burglary nor took any movable property from Ken-Crete Products, was neither a passenger

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in nor the owner of the vehicle stopped by the Kenosha County sheriff's deputy, and that his mere presence near the scene of the crime, without more, was not sufficient for conviction."

- "The defendant's theory of defense is that he did not commit the act charged and that the victim is lying."

1. Defenses recognized in statutes

The following generally applicable defenses are recognized in the Wisconsin Statutes.

• intoxication	§ 939.42	[Wis JI-Criminal 755A and 755B]
• mistake	§ 939.43	[Wis JI-Criminal 770]
• coercion	§ 939.46	[Wis JI-Criminal 790]
• necessity	§ 939.47	[Wis JI-Criminal 792]
• self-defense	§ 939.48	[Wis JI-Criminal 800-820]
• defense of others	§ 939.48(4)	[Wis JI-Criminal 830 and 835]
• defense of property	§ 939.49	[Wis JI-Criminal 855 and 860]

Three other defenses, characterized as "privileges," are recognized in § 939.45:

- conduct in good faith and in an apparently authorized and reasonable fulfillment of any duties of a public office – § 939.45(3) [Wis JI-Criminal 870]
- conduct in reasonable accomplishment of a lawful arrest – § 939.45(4) [Wis JI-Criminal 880 and 885]
- conduct in reasonable discipline of child – § 939.45(5) [Wis JI-Criminal 950]

Some statutes recognize defenses specific to a single offense. [Listed at page 10.]

2. Defenses Recognized In Case Law

In addition to the specific privileges listed in subsections (1) through (5) of § 939.45, subsection (6) provides for other, unspecified, privileges: "When for any other reason the actor's conduct is privileged by the statutory or common law of this state." This rule fits with § 939.10, which provides in part: "The common-law rules of criminal law not in conflict with chs. 939 to 951 are preserved." Wisconsin courts have recognized the following "common law" defenses.

- entrapment [Wis JI-Criminal 780]
- alibi [Wis JI-Criminal 775]
- accident [Wis JI-Criminal 772]
- the "legal justification" defense to speeding [State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982); Wis JI-Criminal 2676]
- the special privilege allowing a felon to possess a firearm under certain limited circumstances [State v. Coleman, 206 Wis.2d 198, 556 N.W.2d 701 (1996); Wis JI-Criminal 1343A]

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C. The Legal Theory of Defense Must be Supported by the Evidence

Assuming that the theory of defense upon which an instruction is requested is one recognized by law, the evidence must support the instruction. This is the standard rule that applies to the giving of an instruction on any topic.[6] The simplest statement of the standard is that there must be "some evidence" on a matter before it becomes an issue on which an instruction must be given.[7] Although more complicated descriptions of the standard are possible, they are beyond the scope of this discussion.[8] The most useful test may be to ask whether there is enough evidence of a defense to generate a jury issue on its existence or nonexistence. The question is "whether a reasonable construction of the evidence will support the defendant's theory 'viewed in the most favorable light it will reasonably admit of from the standpoint of the accused.'"[9]

Though the burden of producing "some evidence" on a defense is commonly referred to as the defendant's burden, that is not literally correct. The source of the evidence may be facts presented by the prosecution, facts elicited from prosecution witnesses by defense cross-examination, or evidence affirmatively presented by the defense.[10]

D. The Theory Is Not Adequately Covered by Other Instructions

Even if a requested theory of defense instruction correctly states the law and is supported by the evidence, it need not be given "[i]f the instructions of the court adequately cover the law applicable to the facts."[11] Appellate courts have invoked this rule in upholding the refusal to give the following requested instructions:

- A requested instruction that the defendant's "theory of defense" is that he lacked the intent to kill was adequately explained through the general instructions given on intent.[12]

- A requested instruction that the witness did not really see the defendant at the crime scene is adequately covered by the general instruction on credibility.[13]

- "[The defendant's] legal theory of defense was simply that he had not committed the crime. The general instructions given by the court were completely adequate for that situation."[14]

- ". . . [T]he defendant's 'theory' was simply that she did not participate in the drug deal . . . this theory was adequately explained to the jury through the instruction defining the substantive offense. . ."[15]

The Committee recommends that this line of reasoning not be applied in an overly strict manner in certain situations. Many well-recognized defenses negative a required element of the crime. For example, involuntary intoxication and mistake are defenses only when they negative the existence of a state of mind essential to the crime.[16] One could argue that a separate

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instruction on such matters is never required because the existence of the mental state is always covered by the instructions defining the substantive offense.[17] An overly literal application of the rule being discussed here obviously would run counter to long-standing practice. The jury ought to be told that the law of the state recognizes that involuntary intoxication or mistake may result in the nonexistence of criminal intent. The recommended practice is to relate the explanation of the defense directly to the element to which it relates.[18]

E. Procedural Considerations

As with any other requested instruction, a proposed "theory of defense" instruction should be submitted to the trial court in writing.[19] The court may reject it if it does not meet the standards discussed here, may use it if it correctly states the law, or may modify it.

The burdens of production and persuasion are discussed below.

F. Conclusion

The Davidson decision offers a framework for evaluating the necessity for instructing on the theory of the defense. The cases interpreting the Davidson rule give considerable leeway in refusing a requested instruction. But the rigid application of the rule may be counterproductive in some cases because the instructions may be helpful in making the jury instructions more understandable.

One of the recommended techniques for improving the understandability of jury instructions is to make them more concrete and less abstract.[20] Emphasizing the facts that relate to a required element is one way to help the jury make the connection between an abstract definition and the case to be decided. Referring to facts can also help to focus the jury's attention on the important issues in the case. For example, if the statutory definition of a crime is complicated and the defense is one of alibi, jurors will be greatly aided by an instruction that helps focus their attention on the alibi issue, rather than on parts of a complicated offense definition that are not in dispute.[21]

II. Affirmative Defenses

A. In General

An "affirmative defense" recognizes a basis for avoiding criminal liability based on facts that are not inconsistent with, and can be present at the same time as, the elements required by the offense definition. That is, all the elements of the crime may be present, but the law recognizes a basis for a finding of not guilty based on facts that are not found in the offense definition.[22] These can properly be called "affirmative defenses" because something affirmative must be done to make them an issue in the case. Sometimes these are further characterized as "privileges," "justifications," or "excuses," but the label is not significant in the context of presenting them to the jury.

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An example is self defense in a battery case. All the elements of the crime defined in § 940.19(1) may be present – causing bodily harm, with intent to cause bodily harm, and without the consent of the victim – but the defendant will not be guilty if he or she acted lawfully in self defense as defined in § 939.48.

Affirmative defenses are generally set forth in the statutes and whether or not to recognize an affirmative defense is generally for the legislature to decide. That said, the Wisconsin Supreme Court has recognized affirmative defenses derived from common law.

1. Recognized by statute

Most statutorily recognized affirmative defenses apply generally to all crimes. Section 939.45 recognizes the defense of "privilege" and specifies several:

- coercion under § 939.46 and necessity under § 939.47 [§939.45(1)]
- defense of persons or property under § 939.48 and § 939.49 [§ 939.45(2)]
- good faith actions in fulfillment of duties of public office [§ 939.45(3)]
- conduct in reasonable accomplishment of a lawful arrest [§ 939.45(4)]

There also affirmative defenses applicable to specific offenses. [Listed at page 10.]

2. Recognized By Court Decision/Common Law

Affirmative defenses not addressed in statutes but recognized in case law include:

- entrapment [Wis JI-Criminal 780]
- the "legal justification" defense to speeding [State v. Brown, 107 Wis.2d 44, 318 N.W.2d 370 (1982); Wis JI-Criminal 2676]
- the special privilege allowing a felon to possess a firearm under certain limited circumstances [State v. Coleman, 206 Wis.2d 198, 556 N.W.2d 701 (1996); Wis JI-Criminal 1343A]

3. Statutory Exceptions; Statements That An Offense "Does Not Apply"

A significant number of criminal provisions contain lists of statutory exceptions. For example, § 941.29, prohibiting possession of a firearm by a felon, includes six subsections listing exceptions [subs. (5) through (10)]. The jury instructions typically treat these exceptions like an affirmative defense: the state need not anticipate them in the charging document and they are not issues in the case until supported by "some evidence." If so supported, the state must prove the inapplicability of the exception beyond a reasonable doubt.

Other statutes take a similar approach but instead of identifying an "exception" they provide that the criminal prohibition "does not apply" to certain situations. For example, § 940.32, prohibiting stalking, includes a provision stating that the offense does not apply to conduct

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protected by the right to freedom of speech or the right to freedom to assemble [sub. (4)(a)] or to conduct connected to a labor dispute [sub. (4)(a)]. The jury instructions treat these in the same matter as exceptions: if raised, the state must prove beyond a reasonable doubt that the facts recognized by the "does not apply" provision are not present.

The jury instructions assume that these matters will rarely come up at trial. Rather, they would more likely be addressed at the charging/pretrial stage. If they would be raised at trial, they should be treated like affirmative defenses.

4. Intentional Homicide: Affirmative Defenses/Mitigating Circumstances

Matters that can be considered affirmative defenses are addressed by the intentional homicide statutes – § 940.01 and § 940.05 – where they are called mitigating circumstances. These matters – adequate provocation, unnecessary defensive force, coercion, etc. – can be considered affirmative defenses to 1st degree intentional homicide because they can prevent a conviction for that offense. However, they are not defenses to 2nd degree intentional homicide. § 940.05(3). Thus, their effect is to reduce culpability for – that is, to "mitigate" responsibility for – an intentional killing. The policy behind this approach is that the defensive matter reduces the actor's culpability for an intentional killing but does not eliminate it.

The statutes specify the procedure for cases involving a mitigating circumstance: when it is "raised by the trial evidence" the prosecution must prove the absence of that circumstance beyond a reasonable doubt. § 940.01(3). This is consistent with the approach that the decision in State v. Moes [discussed below] identified as the default rule in Wisconsin when the statutes do not expressly provide to the contrary.

B. Constitutional And State Law Requirements

1. United States Constitution

Case law interpreting the U.S. Constitution provides that the prosecution must prove all elements of the crime beyond a reasonable and cannot be relieved of this burden by switching it, or any part of it, to the defendant. Mullaney v. Wilbur, 421 U.S. 684 (1975). A burden of production can be imposed on the defendant to point to sufficient facts to raise a defense that challenges proof of an element, but the burden of persuasion remains on the prosecution to prove that element notwithstanding the evidence challenging it.

However, for true affirmative defenses – those that are not inconsistent with elements of the crime – the burden of persuasion can be placed on the defendant to prove the defense. Patterson v. New York, 432 U.S. 197 (1977); Martin v. Ohio, 480 U.S. 228 (1987).

There can be very close distinctions between an element and facts recognized as an affirmative defense. An example is homicide by intoxicated use of a vehicle under § 940.09. In State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985), the Wisconsin Supreme Court identified the elements of the crime as causing death while operating under the influence.

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Proving a causal connection between under-the-influence-operation and the death is not required. Thus, the affirmative defense recognized in § 940.09(2) – that the death would have resulted even if the actor was not under the influence – was not inconsistent with the elements and the burden of persuasion could be imposed on the defendant. The court found that this satisfies the rule of Patterson v. New York.

Evidence may relate both to a challenge to the proof of an element and the establishment of a defense. An example is a charge of 1st degree intentional homicide where the evidence tends to show that the defendant was extremely frightened and upset at the time he or she fired a pistol toward the victim. This evidence could support a challenge to the intent to kill element: I was so upset/frightened I shot toward the victim without aiming and without intent to cause death. The state must prove intent to kill notwithstanding this evidence. The evidence could also support an affirmative defense/mitigating circumstance like adequate provocation: I reasonably believed the victim had done something that caused me to lack self-control completely and which would have caused complete lack of self-control in an ordinary person.[23] The defendant should be allowed to present both the failure of proof defense – there is insufficient evidence of intent to kill – and the affirmative defense – adequate provocation was present. It is not proper to require a defendant to elect between the defenses. See Martin v. Ohio, supra, which discusses this issue in connection with the Ohio statutes defining murder and self defense.

2. Wisconsin State Law

Wisconsin recognizes two approaches to the burden of persuasion on affirmative defenses. The general rule provides that if the defense shows "some evidence" of an affirmative defense, the burden of persuasion is on the state to disprove it. This is not required by the U.S. Constitution [see Patterson v. New York, supra]; it is based on state law. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979). But, where a statutorily recognized affirmative defense satisfies the Patterson test, some statutes specifically place the burden of persuasion on the defendant.

a. The General Rule – State v. Moes

Moes was charged with 1st degree murder [now termed 1st degree intentional homicide] and raised the defense/mitigating circumstance of coercion under § 939.46. On appeal, he claimed the jury instructions did not clearly impose the burden on the state to disprove coercion, denying him due process. The Wisconsin Supreme Court undertook the analysis that Patterson requires, first identifying the elements of the crime: cause death, with intent to kill. Then the court identified the facts constituting the defense of coercion: a threat by other than a coconspirator, that causes the actor to reasonably believe that committing the crime is the only means of preventing death or great bodily harm to the actor or another. The court found that the facts constituting the defense are not inconsistent with the elements of the crime: one can cause death with the intent to kill and still satisfy the requirements for coercion. Thus, under Patterson there is no due process barrier to imposing the burden of persuasion on the defendant to prove the affirmative defense of coercion.

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However, the court held that Wisconsin state law imposed the burden of persuasion on the prosecution to disprove affirmative defenses. This was based on § 939.70, enacted as part of the 1956 revision of the Criminal Code, which provides that no provisions of the new code "shall be construed as changing the existing law with respect to presumption of innocence or burden of proof." The court held that "existing law" required the state to disprove affirmative defenses.

b. Statutes Placing The Burden Of Persuasion On The Defendant

The Moes general rule does not apply where the statute defining an offense specifically assigns the burden of persuasion to the defendant. This is permitted under the U.S. Constitution as interpreted in Patterson v. New York when the facts recognized by the defense are not inconsistent with – can exist at the same time as – the elements of the crime. This approach is also permissible under Moes, which recognized that assigning the burden of persuasion in this situation is a matter of state law choice. When the Patterson test is met, the legislature is free to choose to impose the burden of persuasion on the defendant. For example:

940.09(2)	Homicide By Intoxicated Use Of A Vehicle/Firearm [JI 1185, 1186, 1186A, 1187, 1189, 1190, 1191]
940.25(2)	Injury [Great Bodily Harm] By Intoxicated Use Of A Vehicle [JI 1262, 1263, 1263A, 1266]
943.201(3)	"Identity Theft" [JI 1458]
943.201(3)	"Identity Theft – Entity" [JI 1459]
943.23(3m)	Operating Motor Vehicle Without Owner's Consent [JI 1465A]
948.05(3)	Sexual Exploitation Of A Child [JI 2121A]
948.11(2)(c)	Exposing A Child To Harmful Material [JI 2142A]
948.22(6)	Failure To Support [JI 2152A]
948.31(4)	Interference With [Child] Custody [JI 2169]

Each of these provisions assigns the burden of persuasion to the defendant to establish the defense by "a preponderance of the evidence." [Note: the uniform instructions for these defenses use the equivalent description of the civil burden of persuasion: "to a reasonable certainty by the greater weight of the credible evidence."]

C. Instructing The Jury

1. In The Absence Of A Specific Statute

Where a generally-applicable affirmative defense is involved, the court should instruct on the elements of the crime and, if burden of production has been satisfied, instruct on the substance of the defense. The instructions must provide that the burden is on the state to prove all elements of the crime and to prove that the defense does not apply – all beyond a reasonable doubt. [This is the procedure required by Moes v. State, supra.]

Many of the published instructions have versions that integrate the affirmative defense with the offense definition. For example, Wis JI-Criminal 1220A Battery: Self-Defense In Issue,

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integrates an instruction on self-defense with the elements of battery under § 940.19(1). After defining the elements of battery, the instruction adds material beginning with the caption "Self-Defense Is An Issue In This Case." It then defines the law of self-defense and provides that "the state must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense."

2. Where A Statute Places The Burden Of Persuasion On The Defendant

Several Wisconsin statutes provide that the burden of persuasion is on the defendant to establish an affirmative defense recognized for a particular crime. [See list above.] The court should instruct on the elements of the crime and, if the burden of production has been satisfied, instruct on the substance of the defense. The instructions must provide that the burden is on the state to prove all elements of the crime beyond a reasonable doubt and that the burden is on the defendant to prove the defense by the greater weight/preponderance of the evidence.

Instructions typically call for adding a section captioned "Consider Whether the Defense Has Been Proved." The content of the defense is described and the jurors are told that the burden is on the defendant to prove that the defense is established "by the greater weight of the credible evidence" and that if they are so satisfied they must find the defendant not guilty.

III. Negative [Failure of Proof] Defenses

A. In General

Defenses in this category are sometimes referred to as "negative defenses" but the term "failure of proof defense" is used here as a more accurate description of their function. A failure of proof defense is based on facts that are inconsistent with an element required by the offense definition and therefore prevent that element from being proved.[24]

An example is a claim in a theft case that the person believed the property he or she took was his or her own. The elements of theft under § 943.20(1)(a) require intentionally taking and carrying away property of another without the owner's consent. "Intentionally" further requires that the actor knew the property belonged to another. § 939.23(3). If the actor actually believes that the property belonged to him or her, the prosecution fails to prove the knowledge element.

Some failure of proof defenses are recognized in the statutes. Mistake – § 939.43(1) – and involuntary intoxication – § 939.42(2) – are defenses when they "negative the state of mind essential to the crime."

Failure of proof defenses can exist whether or not they are recognized in the statutes – any fact that is logically relevant to the non-existence of an element of a crime can be a defense.

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B. Constitutional And State Law Requirements

Case law interpreting the U.S. Constitution provides that the prosecution must prove all elements of the crime beyond a reasonable doubt and cannot be relieved of this burden by switching it, or any part of it, to the defendant. Mullaney v. Wilbur, 421 U.S. 684 (1975). A burden of production can be imposed on the defendant to point to sufficient facts to raise a defense that challenges proof of an element, but the burden of persuasion remains on the prosecution to prove that element notwithstanding the evidence challenging it.

The corollary of this rule is that the defendant has a due process right to challenge the elements of the crime and to introduce relevant evidence to support that challenge. Martin v. Ohio, 480 U.S. 228 (1987); Chambers v. Mississippi, 410 U.S. 284 (1973).

Because the rule is constitutionally-required, it is the same in Wisconsin.

C. Instructing The Jury

There are published instructions for the two codified failure of proof defenses: JI 770 Mistake and JI 755B Involuntary Intoxication. They each call for relating the instruction on the defense to the mental state to which it applies. The jurors are instructed that they must consider the evidence in deciding whether the state has proved the element beyond a reasonable doubt. In other words, if evidence relevant to the nonexistence of an element has been admitted, the state must prove the existence of the element notwithstanding the potentially element-negating evidence.

For example, JI 770 provides in part:

> Evidence has been received which, if believed by you, tends to show that the defendant believed that [HERE IDENTIFY THE DEFENDANT'S BELIEF]. You must consider this evidence in deciding whether the defendant acted with the (describe mental state) required for this offense.

Because failure of proof defenses can exist whether or not they are recognized in the statutes, a similar instruction should be considered whenever there is evidence of a fact that is logically relevant to the non-existence of an element of a crime.

IV. Inconsistent Defenses

Requests for instructions on defenses should not be denied solely because the defenses might be characterized as "inconsistent." As a practical matter, it may be difficult for significantly different claims to be persuasive or understandable, but any defensive matters supported by a reasonable view of the evidence should be presented to the jury. "As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63 (1988).

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V. The "Insanity Defense"

What is commonly referred to as the "insanity defense" is designated in Wisconsin as "not guilty by reason of mental disease or defect." See §§ 971.15 - 971.17. An outline of the substance and procedure is provided at Wis JI-Criminal 600 Introductory Comment.

The defense is similar to other affirmative defenses in the sense that it is not an issue in the case until the defendant raises it. It differs from other affirmative defenses in that it must be raised by a special plea pursuant to § 971.06(1)(d) and is adjudicated in a two-part procedure set forth in § 971.165.

The first phase involves a determination of guilt [by plea or trial] just like any other case. If there is a trial, the defendant is entitled to raise any defenses that are supported by the facts, including a challenge to any mental state required by the offense definition.[25]

If guilt is established at the first phase, the second phase addresses whether the defendant is "not guilty by reason of mental disease or defect." If there is a trial as to the second phase, the burden of persuasion is on the defendant to establish to a reasonable certainty by the greater weight of the evidence that:

- as a result of mental disease or defect, the defendant lacks substantial capacity either
- to appreciate the wrongfulness of the conduct OR
- to conform his or her conduct to the requirements of law.

If the defendant meets this burden, the result is a finding of guilty but "not guilty by reason of mental disease or defect." This is better characterized as "guilty but not criminally responsible" because the result of "success" at the second phase is not an acquittal but relief from criminal punishment and a commitment for treatment. § 971.17(1).

COMMENT

Wis JI-Criminal 700 Law Note was originally published in 1990. This revision was approved by the Committee in June 2020.

1. See State v. Watkins, 2002 WI 101, ¶¶39-40, 255 Wis.2d 265, 647 N.W.2d 244 and State v. Campbell, 2006 WI 99, ¶51, footnote 10, 294 Wis.2d 100, 718 N.W.2d 649. Also see, §1.8(c) Affirmative Defenses, LaFave, Substantive Criminal Law 2d Ed., (West 2003).

2. The Wisconsin Supreme Court refers to "negative defenses" in State v. Watkins and State v. Campbell, note 1 supra. "Failure of proof defenses are nothing more than instances where, because of the 'defense,' the prosecution is unable to prove all the required elements of the offense . . ." § 21. A System of Defenses, Robinson, Criminal Law Defenses, (West Thomsen 1984-2019).

3. See the cases cited in notes 12-16, below.

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4. State v. Gaudesi, 112 Wis.2d 213, 332 N.W.2d 302 (Ct. App. 1983).

5. The examples are based on instructions discussed in unpublished decisions of the Wisconsin Court of Appeals. The Committee believes they illustrate requested instructions calling for discussion of the evidence and, therefore, may properly be refused.

6. See, e.g., Turner v. State, 64 Wis.2d 45, 51, 218 N.W.2d 502 (1974).

7. For example, ". . . the defendant must point to some evidence of the degree of intoxication which constitutes a defense." State v. Strege, 116 Wis.2d 477, 486, 343 N.W.2d 100 (1984), emphasis added.

8. A more complete statement that attempts to relate the evidentiary standard to the requirement that the state to disprove defenses provides:

> [I]f it appears from the evidence, either that produced by the state or by the defense, that a jury, under a reasonable view of the evidence, could conclude that the state has not sustained its burden of disproving [the defense].
> State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

It may be questioned whether the "some evidence" standard can be elaborated upon in a helpful way. The Model Penal Code uses the phrase "[when] there is evidence supporting the defense." The commentary indicates that the "draft does not attempt to state how strong the evidence must be to satisfy the test 'that there is evidence' supporting the defense. . . . It should suffice to put the prosecution to its proof beyond a reasonable doubt that the defendant shows enough to justify such doubt upon the issue." Model Penal Code § 1.13 (Tent. Draft No. 4, 1955), Commentary at 110. A commentator has concluded that "the commentary on what will satisfy the burden of producing evidence is singularly unhelpful," but points out that "in the context of particular issues, and recurring fact situations, however, courts have developed a common law of sufficiency for this purpose." Underwood, "Burdens of Persuasion in Criminal Cases," 86 Yale L. J. 1299, 1335 (1983).

9. State v. Mendoza, 80 Wis.2d 122, 153, 258 N.W.2d 260 (1977), citing Ross v. State, 61 Wis.2d 160, 172, 211 N.W.2d 827 (1973). Both cases addressed the issue in the context of the sufficiency of the evidence to require submitting an instruction on a lesser included offense based on a claim of self defense.

10. "In some instances the prosecution's case may contain sufficient evidence in support of the defendant's position to generate a jury issue." Patterson v. New York, 432 U.S. 197, 231 n. 17 (1977) (Powell, J., dissenting). Also see State v. Felton, note 8, supra: "[I]f it appears from the evidence, either that produced by the state or by the defense . . ."

11. State v. Pruitt, 95 Wis.2d 69, 80, 289 N.W.2d 343 (Ct. App. 1980).

12. State v. Pruitt, supra.

13. Johnson v. State, 75 Wis.2d 344, 307, 249 N.W.2d 593 (1977).

14. State v. Lenarchick, 74 Wis.2d 425, 456, 247 N.W.2d 80 (1976).

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15. State v. Roubik, 137 Wis.2d 301, 309, 404 N.W.2d 105 (Ct. App. 1987).

16. Sections 939.42(2), 939.43(1).

17. See, for example, Justice Callow's dissent in State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981), where he argued that where a recognized defense [in this case, intoxication] negates an element of the crime, it is unnecessary to advise the jury specifically that the State must "disprove" that defense: "It is elementary that to prove a thing exists one must in effect disprove its nonexistence. Thus when a jury is instructed that the state must prove intent beyond a reasonable doubt, it means there must be no reasonable doubt arising from intoxication or any other intent-negating factor." 102 Wis.2d 423, 442-43.

18. See, for example, Wis JI-Criminal 770 Mistake.

19. Section 972.10(5).

20. See, for example, Elwork, Sales & Alfini, Making Jury Instructions Understandable (Michie 1982); Charrow & Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," 79 Columbia Law Review 1306 (1979); and Strawn & Buchanan, "Jury Confusion: A Threat to Justice," 59 Judicature 478 (1976).

21. Care must be taken to assure that adequate instruction is given on each element of the crime. This discussion assumes that the defense is requesting the attention-focusing instruction.

22. See note 1, supra.

23. See §§ 939.44 and 940.01(2)(a).

24. "Failure of proof defenses are nothing more than instances where, because of the 'defense,' the prosecution is unable to prove all the required elements of the offense . . ." § 21. A System of Defenses, Robinson, Criminal Law Defenses, (West Thomsen 1984-2019).

25. In State v. Steele, 97 Wis.2d 72, 97-98, 294 N.W.2d 2 (1980), the Wisconsin Supreme Court held that expert opinion testimony on the defendant's capacity to form a mental element required as an element of the crime is not admissible at the first phase of the trial. Cases decided after Steele have made it clear that the rule excluding expert testimony is limited to expert opinion testimony on the capacity to form intent based on mental health history. State v. Flattum, 122 Wis.2d 282, 361 N.W.2d 705 (1985) and State v. Repp, 122 Wis.2d 246, 362 N.W.2d 41 (1985). [Emphasis added.] For a helpful discussion of what the current rule is and how it developed, see Haas v. Abrahamson, 910 F.2d 384 (7th Cir. 1990).

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815 PRIVILEGE: SELF-DEFENSE: NOT AVAILABLE TO ONE WHO PROVOKES AN ATTACK: REGAINING THE PRIVILEGE — § 939.48(2)

[ADD THE FOLLOWING TO WIS JI-CRIMINAL 800, 801, OR 805 WHEN SUPPORTED BY THE EVIDENCE.]

Provocation

You should also consider whether the defendant provoked the attack. A person who engages in unlawful conduct[1] of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack.

[USE ANY OF THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.]

[However, if the attack which follows causes the person reasonably to believe that he or she is in imminent danger of death or great bodily harm, he or she may lawfully act in self-defense. But the person may not use or threaten force intended or likely to cause death unless he or she reasonably believes he or she has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.]

[A person who provokes an attack may regain the right to use or threaten force if the person in good faith withdraws from the fight and gives adequate notice of the withdrawal to his assailant.]

[A person who provokes an attack whether by lawful or unlawful conduct with intent to use such an attack as an excuse to cause death or great bodily harm to another person is not entitled to use or threaten force in self-defense.]

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COMMENT

Wis JI-Criminal 815 was originally published in 1962 and revised in 1994 and 1999. The 1999 revision updated the comment. This revision amended the language of the instruction to more accurately reflect the language of Wis. Stat. 939.48(2)(a) and was approved by the Committee in July 2019.

The 1962 version of Wis JI-Criminal 815 was cited as a correct statement of the law in State v. Walker, 99 Wis.2d 687, 695-96, 299 N.W.2d 861 (1981). It was reviewed again in State v. Herriges, 155 Wis.2d 297, 455 N.W.2d 635 (Ct. App. 1990). The court held that a person who provokes an attack must retreat in order to regain the privilege of self-defense, even if that person is in his own home:

> . . . . The home provides a haven, not an arena. "One assaulted in his house need not flee therefrom. But his house is his castle only for the purposes of defense. It cannot be turned into an arsenal for the purposes of offensive effort against the lives of others. It is a shelter, but not a sally-port." Raines v. State, 445 So.2d 967, 972 (Ala. Crim. App. 1984). We therefore follow the direction given by our supreme court in Miller and adopt the rule that if there has been provocation by the one assaulted, even if that provocation occurs in the home, successful assertion of self-defense requires a reasonable belief that one cannot retreat before force likely to cause death or great bodily harm may be used.

155 Wis.2d 297, 304-05.

The "duty to retreat" is extensively discussed in Wis JI-Criminal 810.

1. The first paragraph of the instruction reflects the rule stated in sub. (2) of § 939.48, which provides that a "person who engages in unlawful conduct of a type likely to provoke others . . ." loses the right to claim the privilege of self-defense. In State v. Boughneit, 97 Wis.2d 687, 294 N.W.2d 675 (Ct. App. 1980), the court held that engaging in what would be considered disorderly conduct under § 947.01 would constitute "unlawful conduct" for the purposes of § 939.48(2).

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WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME II

Wisconsin Criminal Jury Instructions Committee

University of Wisconsin Law School

[Cite as Wis JI-Criminal]

• Includes Release No. 58

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* * *

1185 HOMICIDE BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE — § 940.09(1)(a)

Statutory Definition of the Crime

Section 940.09(1)(a) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle.[3]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[4]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[5] in producing the death.

3. The defendant was under the influence of an intoxicant at the time the defendant operated a vehicle.

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Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was materially impaired because of consumption of an alcoholic beverage.[6]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be materially impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[7]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[8]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[9] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[10] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210

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liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[11]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[12]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[13] USE THE FOLLOWING:

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[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[14] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[15]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[16] does not by itself provide a defense to the crime charged against the defendant.[17] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not been under the influence of an intoxicant and had been exercising due care.]

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Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[18]]

COMMENT

Wis JI-Criminal 1185 was originally published in 1962 and revised in 1980, 1982, 1985, 1986, 1993, 2004, 2006, and 2014. This revision was approved by the Committee in December 2019; it added to the comment pertaining to the mandatory period of confinement created by 2019 Wisconsin Act 31.

This instruction is drafted for violations of § 940.09(1)(a), causing death while operating under the influence an intoxicant. For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

See Wis JI-Criminal 1186 for the related offense involving a prohibited alcohol concentration [PAC] of .08 or more. For persons with three or more priors, the PAC level is .02. See Wis JI-Criminal 1186A. For cases involving two charges – under the influence and PAC – see Wis JI-Criminal 1189.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. See sub. (1c)(a) and sub. (1c)(b). Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09 was revised by 2019 Wisconsin Act 31. The offense definition did not change but sub. (1c)(a) and (b) were amended to require a mandatory minimum term of five years confinement unless the court finds "a compelling reason and places its reason on the record." [The effective date of

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Act 31 is November 22, 2019; but this date does not preclude the counting of other convictions, suspensions, or revocations as prior convictions, suspensions, or revocations for purposes of administrative action by the department of transportation or sentencing court.]

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 13 and following. The defense was formerly addressed in a separate instruction, Wis JI Criminal 1188, which has been withdrawn. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

Offenses involving firearms and airguns are also covered by § 940.09, see sub. (1g) and Wis JI-Criminal 1190 and 1191.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. This instruction is drafted for cases involving the influence of an intoxicant, which is defined to include "an alcohol beverage, hazardous inhalant, . . . a controlled substance or controlled substance analog under ch. 961, . . . any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or . . . any other drug, or . . . an alcohol beverage and any other drug." See § 939.22(42) in note 6, below. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

2. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

3. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

4. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

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The statute does provide the defendant with an affirmative defense in certain situations, see footnote 12, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of death as required by the second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been under the influence and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

6. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. The definition in the instruction paraphrases the full definition provided in § 939.22(42):

> "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or of any other drug or of an alcohol beverage and any other drug.

Note: "hazardous inhalant" was added to the definition in § 939.22(42) by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013]. Act 83 also created a definition of "hazardous inhalant" in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

7. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

8. It may be that cases will be charged under § 940.09(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

9. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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10. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI Criminal 2600 Introductory Comment, Sec. X.

13. See note 12, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

14. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

15. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

16. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

17. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 15, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

18. This statement is included to assure that both options for a not guilty verdict are clearly presented:

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1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1186 HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.08 GRAMS OR MORE — § 940.09(1)(b)

Statutory Definition of the Crime

Section 940.09(1)(b) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while that person has a prohibited alcohol concentration.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle.[3]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[4]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[5] in producing the death.

3. The defendant had a prohibited alcohol concentration at the time the defendant operated a vehicle.

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Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[6]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[7]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[8] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[9] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[10]

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[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[11]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[12] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[13] that this defense is established.

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"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[14]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[15] does not by itself provide a defense to the crime charged against the defendant.[16] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had a prohibited alcohol concentration and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[17]]

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COMMENT

Wis JI-Criminal 1186 was originally published in 1982 and revised in 1985, 1986, 1992, 2004, and 2005. This revision was approved by the Committee in December 2019; it added to the comment pertaining to the mandatory period of confinement created by 2019 Wisconsin Act 31.

This instruction is drafted for violations of § 940.09(1)(b) involving a prohibited alcohol concentration [PAC] of .08 or more. The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003. For persons with three or more priors, the PAC level is .02. For an instruction addressing that case, see Wis JI-Criminal 1186A.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. See sub. (1c)(a) and sub. (1c)(b). Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09 was revised by 2019 Wisconsin Act 31. The offense definition did not change but sub. (1c)(a) and (b) were amended to require a mandatory minimum term of five years confinement unless the court finds "a compelling reason and places its reason on the record." [The effective date of Act 31 is November 22, 2019; but this date does not preclude the counting of other convictions, suspensions, or revocations as prior convictions, suspensions, or revocations for purposes of administrative action by the department of transportation or sentencing court.]

See Wis JI-Criminal 1185 for the related offense of causing death while operating under the influence, as defined in § 940.09(1)(a). For cases involving two charges – operating under the influence and with a PAC – see Wis JI-Criminal 1189.

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 12 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 1188, which has been withdrawn. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

Offenses involving firearms and airguns are also covered by § 940.09, see sub. (1g) and Wis JI-Criminal 1190 and 1191.

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The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Section 940.09(1)(b) defines this offense as causing death by operation or handling a vehicle "while the person has a prohibited alcohol concentration as defined in s. 340.01(46m)." Section 340.01(46m), as amended by 2003 Wisconsin Act 30 [effective date: September 30, 2003], provides as follows:

(46m) "Prohibited alcohol concentration" means one of the following:

(a) If the person has 2 or fewer prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of 0.08 or more.

[(b) – repealed]

(c) If the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of more than 0.02.

Section 340.01(1v) defines "alcohol concentration" as follows:

(1v) "Alcohol concentration" means any of the following:

(a) The number of grams of alcohol per 100 milliliters of a person's blood.

(b) The number of grams of alcohol per 210 liters of a person's breath.

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the third element. It then provides for using the appropriate measure of alcohol concentration – blood alcohol or alcohol in the breath – in the definition of the third element. For cases involving 0.02 level, see Wis JI-Criminal 1186A.

2. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

3. Section 939.22(44) defines "vehicle" as follows:

"Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

4. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

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There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 11, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of death as required by the second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been under the influence and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

6. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

7. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

8. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

12. See note 11, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

13. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

14. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court

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recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

15. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

16. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 14, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

17. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1186A HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.02 GRAMS OR MORE — § 940.09(1)(b)

Statutory Definition of the Crime

Section 940.09(1)(b) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while that person has a prohibited alcohol concentration.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following [three] [four][2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[3] a vehicle.[4]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[5]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[6] in producing the death.

3. The defendant had a prohibited alcohol concentration at the time the defendant operated a vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[7]

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[.02 grams or more of alcohol in 210 liters of the person's breath].

[.02 grams or more of alcohol in 100 milliliters of the person's blood].

NOTE: THE DEFENDANT'S ADMISSION OF THREE OR MORE PRIOR CONVICTIONS DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THIS ELEMENT AND PROCEED TO THE PARAGRAPH CAPTIONED "HOW TO USE THE TEST RESULT EVIDENCE."[8]

[4. The defendant had three or more convictions, suspensions, or revocations, as counted under § 343.307(1).][9]

IF THE FOURTH ELEMENT IS INCLUDED AND IF REQUESTED BY THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:[10]

[Evidence has been received that the defendant had prior convictions, suspensions, or revocations. This evidence was received as relevant to the status of the defendant's driving record, which is an issue in this case. It must not be used for any other purpose and, particularly, you should bear in mind that conviction, suspension, or revocation at some previous time is not proof that the defendant operated a motor vehicle with a prohibited alcohol concentration on this occasion.]

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[11]

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IF AN ALCOHOL TEST IS INVOLVED, THE FOLLOWING MAY BE ADDED:[12]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[13]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[14] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[15] that this defense is established.

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"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[16]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[17] does not by itself provide a defense to the crime charged against the defendant.[18] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had a prohibited alcohol concentration and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.][19]

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COMMENT

This instruction was originally published as Wis JI-Criminal 1186.1 in 1992. It was revised and renumbered Wis JI-Criminal 1186A in 1998 and revised again in 2004. This revision was approved by the Committee in December 2019; it added to the comment pertaining to the mandatory period of confinement created by 2019 Wisconsin Act 31.

This instruction has been revised for use for offenses involving a prohibited alcohol concentration level [PAC] of .02 or more, which applies to persons with three or more priors. See § 340.01(46m)(c), created by 1999 Wisconsin Act 109. [Effective date: January 1, 2001.]

The fact of having three or more priors is included as a bracketed fourth element in this instruction. It is an element because the existence of priors changes the substantive definition of the crime from an alcohol concentration of .08 or more to one of .02 or more. It is in brackets because it is not to be submitted to the jury if the defendant admits having the priors. See footnotes 2 and 8, below. When priors change the offense from a forfeiture to a crime or increase the criminal penalty, they need not be submitted to the jury. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

The instruction previously published as Wis JI-Criminal 1186A dealt with a PAC of .08 or more. 2003 Wisconsin Act 30 changed the generally applicable PAC level to .08 or more for persons with 2 or fewer prior convictions, suspensions or revocations, as counted under § 343.307(1). [Effective date: September 30, 2003.] Wis JI-Criminal 1186 has been revised to apply to those cases.

See Wis JI-Criminal 1185 for the related offense of causing death while operating under the influence, as defined in § 940.09(1)(a). For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. See sub. (1c)(a) and sub. (1c)(b). Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09 was revised by 2019 Wisconsin Act 31. The offense definition did not change but sub. (1c)(a) and (b) were amended to require a mandatory minimum term of five years confinement unless the court finds "a compelling reason and places its reason on the record." [The effective date of Act 31 is November 22, 2019; but this date does not preclude the counting of other convictions, suspensions, or revocations as prior convictions, suspensions, or revocations for purposes of administrative action by the department of transportation or sentencing court.]

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 12 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 1188, which has been withdrawn. The

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constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the statutory definition of "prohibited alcohol concentration," see note 1, Wis JI-Criminal 1186.

2. The instruction is drafted to allow for use with either three or four elements, depending on whether the fourth element, relating to the defendant having three or more prior convictions, suspensions or revocations, is submitted to the jury. See discussion at note 8, below.

3. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

4. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. See note 5, Wis JI-Criminal 1186.

7. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

8. The fourth element has been placed in brackets because the Committee concluded that the "status element" of this offense must be addressed in the same manner as for .08 offenses under the version of the law addressed in State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997). In Alexander, the Wisconsin Supreme Court referred to this element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions or revocations [the relevant number under prior law], the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 628, 646. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 628, 651. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 628, 649-50.

The court gave explicit direction to the trial courts as to how to handle this situation:

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"When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The 'prohibited alcohol concentration' means 0.08 . . ."
214 Wis.2d 628, 651-52.

By placing the "status element" in brackets, the Committee intends to implement the approach approved in Alexander. If the defendant admits the "status element," the instruction should be given with three elements: causing death, by operating a vehicle, and, having an alcohol concentration of more than .02. If the defendant does not admit the "status element," the instruction should be given with a fourth element: having three or more prior convictions, suspensions or revocations as counted under § 343.307(1).

Because the defendant's admission removes an element from the jury's consideration, the record should reflect the defendant's acknowledgment that a jury determination is, in effect, being waived on the "status element."

9. This element is not to be included if the defendant admits the priors. See note 8, supra.

The text of the fourth element is based on the definition of "prohibited alcohol concentration" in § 340.01(46m)(b). The types of convictions, suspensions, and revocations that are counted under § 343.307(1) are convictions for operating while intoxicated or suspensions or revocations for refusal to submit to chemical tests for alcohol. The priors may include offenses in other jurisdictions. The text of § 343.307(1) is provided in Wis JI-Criminal 2600 Introductory Comment.

The Committee concluded that the instruction should use the statutory language "as counted under § 343.307(1)" because evidence of the defendant's driving record will usually be submitted with testimony that the prior offenses are those that are counted under the statute.

10. Making the fact of prior convictions, etc., an issue for the jury creates the possibility that a jury may make improper use of the evidence relating to the defendant's driving record. Therefore, upon request, an instruction should be given on the limited use to be made of the driving record evidence. In State v. Ludeking, 195 Wis.2d 132, 536 N.W.2d 119 (Ct. App. 1995), the court pointed to this cautionary paragraph as a way to offset the inevitable prejudicial impact of presenting this evidence to the jury.

11. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of .02 or more any prima facie effect. So there is no statutory authority for the typical statement that discusses test results like the ones included in the instructions for .08 offenses. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising

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due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

14. See note 12, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

15. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

16. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

17. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

18. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 16, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

19. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1187 HOMICIDE BY OPERATION OF A VEHICLE WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE — § 940.09(1)(am)

Statutory Definition of the Crime

Section 940.09(1)(am) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while the person has a detectable amount of a restricted controlled substance in his or her blood.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[1] a vehicle.[2]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[3]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[4] in producing the death.

3. The defendant had a detectable amount of a restricted controlled substance in his or her blood at the time the defendant operated a vehicle.

   (Name restricted controlled substance) is a restricted controlled substance.[5]

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How to Use the Test Result Evidence

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the operating.[6]

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied beyond a reasonable doubt that there was a detectable amount of (name restricted controlled substance) in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the operating but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the alleged operating unless you are satisfied of that fact beyond a reasonable doubt.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[7]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

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IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[8] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a detectable amount of (name restricted controlled substance) in his or her blood.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[9] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[10]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[11] does not by itself provide a defense to the crime charged against the defendant.[12] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had a detectable amount of (name restricted controlled substance) in his or her blood.]

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Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[13]]

COMMENT

Wis JI-Criminal 1187 was originally published in 2007 and revised in 2010. This revision was approved by the Committee in December 2019; it added to the comment pertaining to the mandatory period of confinement created by 2019 Wisconsin Act 31.

This instruction is drafted for violations of § 940.09(1)(am), causing death while operating a vehicle with a detectable amount of a restricted controlled substance. The statute was created by 2003 Wisconsin Act 97 and applies to offenses committed on or after the Act's effective date: December 19, 2003. For a general discussion of Act 97, see Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

This instruction may be useful as a model for violations of § 940.25(1)(am) and § 346.63(2)(a)3., which address causing great bodily harm and causing injury by operating with a detectable amount of a restricted controlled substance. There are no uniform instructions for those offenses.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. See sub. (1c)(a) and sub. (1c)(b). Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09 was revised by 2019 Wisconsin Act 31. The offense definition did not change but sub. (1c)(a) and (b) were amended to require a mandatory minimum term of five years confinement unless the court finds "a compelling reason and places its reason on the record." [The effective date of Act 31 is November 22, 2019; but this date does not preclude the counting of other convictions, suspensions, or revocations as prior convictions, suspensions, or revocations for purposes of administrative action by the department of transportation or sentencing court.]

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Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and . . . he or she did not have a detectable amount of a restricted controlled substance in his or her blood . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 8 and following. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

2. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

3. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

4. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 8, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of death as required by the second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been operating "with a detectable amount" and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

5. The Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a detectable amount of the substance in his or her blood remains a jury question.

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Section 340.01(50m) defines "restricted controlled substance" as follows:

(50m) 'Restricted controlled substance' means any of the following:

(a) A controlled substance included in schedule I other than tetrahydrocannabinol.
(b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
(c) Cocaine or any of its metabolites.
(d) Methamphetamine.
(e) Delta-9-tetrahydrocannabinol.

6. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI-Criminal 2663. [The Committee's general approach to instructing on test results is discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper to use it for tests in "restricted controlled substance" cases as well.

Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for "detectable amount of a restricted controlled substance" cases is not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

> 885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests, reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of driving;
- sub. (1k) does not directly provide for admissibility of test results; and,
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test with having a detectable amount at the time of driving.

As to the second difference – admissibility – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence" strongly implies that the analysis is admissible. As to the third difference – connection with the time of driving – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence on the issue of the person having . . ." may express a legislative intent that the analysis be admissible to prove the material issue "that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . ." as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses the "prima facie" effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue which it is offered to prove.

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7. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

8. See note 7, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

9. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

10. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

11. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

12. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 10, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

13. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1189 HOMICIDE BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE / HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION OF 0.08 GRAMS OR MORE — § 940.09(1)(a) and § 940.09(1)(b)

Statutory Definition of the Crime

The first count in the criminal complaint charges that the defendant caused the death of another by the operation or handling of a vehicle while under the influence of an intoxicant[1] in violation of § 940.09(1)(a) of the Wisconsin Statutes.

The second count in the criminal complaint charges that the defendant caused the death of another by the operation or handling of a vehicle on a highway while the defendant had a prohibited alcohol concentration in violation of § 940.09(1)(b) of the Wisconsin Statutes.

To these charges, the defendant has entered pleas of not guilty which means the State must prove every element of each offense charged beyond a reasonable doubt.[2]

It is for you to determine whether the defendant is guilty of one, both, or neither of the offenses charged. You must make a finding of guilty or not guilty for each offense charged.[3]

Each count charges a separate offense, and you must consider each one separately.

Definition of Count 1 – Homicide By Operation Of A Vehicle While Under The Influence Of An Intoxicant

Section 940.09(1)(a) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.[4]

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State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of Count 1 – Homicide By Operation Of A Vehicle While Under The Influence Of An Intoxicant

1. The defendant operated[5] a vehicle.[6]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[7]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[8] in producing the death.

3. The defendant was under the influence of an intoxicant at the time the defendant operated a vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was materially impaired because of consumption of an alcoholic beverage.[9]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able

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to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be materially impaired.

Definition of Count 2 – Homicide By Operation Of A Vehicle With A Prohibited Alcohol Concentration

Section 940.09(1)(b) of the Wisconsin Statutes is violated by one who operates or handles a vehicle on a highway with a prohibited alcohol concentration.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must satisfy you beyond a reasonable doubt that the following three elements were present.

Elements of Count 2 – Homicide By Operation Of A Vehicle With A Prohibited Alcohol Concentration

1. The defendant operated a vehicle.
2. The defendant's operation of a vehicle caused the death of (name of victim).
3. The defendant had a prohibited alcohol concentration at the time the defendant operated a motor vehicle.

   "Prohibited alcohol concentration" means[10]

   [.08 grams or more of alcohol in 210 liters of the person's breath].

   [.08 grams or more of alcohol in 100 milliliters of the person's blood].

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How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a motor vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[11]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[12] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[13] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, but you are not required to do so. You the jury are here to decide these questions on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[14]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not

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required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[15]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that the defendant caused the death of another by the operation of a vehicle while under the influence of an intoxicant, you should find the defendant guilty of Count 1.

If you are not so satisfied, you must find the defendant not guilty of Count 1.

If you are satisfied beyond a reasonable doubt that the defendant caused the death of another by the operation of a vehicle while the defendant had a prohibited alcohol concentration, you should find the defendant guilty of Count 2.

If you are not so satisfied, you must find the defendant not guilty of Count 2.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[16] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to the crime charged in Count 1 if the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant.

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Wisconsin law further provides that it is a defense to the crime charged in Count 2 if the death would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[17] that this defense is established as to each count.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION[18]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[19] does not by itself provide a defense to the crime charged against the defendant.[20] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant or had not had a prohibited alcohol concentration.]

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Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that the defense is proved as to Count 1, you must find the defendant not guilty of Count 1.

If you are not satisfied that the defense is proved as to Count 1 and you are satisfied beyond a reasonable doubt that all elements of the offense have been proved as to Count 1, you should find the defendant guilty of Count 1.

If you are not satisfied beyond a reasonable doubt that all elements of the offense have been proved as to Count 1, you must find the defendant not guilty of Count 1.[21]

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that the defense is proved as to Count 2, you must find the defendant not guilty of Count 2.

If you are not satisfied that the defense is proved as to Count 2 and you are satisfied beyond a reasonable doubt that all elements of the offense have been proved as to Count 2, you should find the defendant guilty of Count 2.

If you are not satisfied beyond a reasonable doubt that all elements of the offense have been proved as to Count 2, you must find the defendant not guilty of Count 2.[22]]

COMMENT

Wis JI-Criminal 1189 was originally published in 2004 and revised in 2006 and 2014. This revision was approved by the Committee in December 2019; it added to the comment pertaining to the mandatory period of confinement created by 2019 Wisconsin Act 31.

This instruction is drafted for the case where two counts of homicide by intoxicated use of a vehicle under § 940.09 based on the same incident are submitted to the jury: one alleging causing death by the

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operation of a vehicle while under the influence and one alleging causing death by the operation of a vehicle with a prohibited alcohol concentration of 0.08 or more. It includes the affirmative defense recognized by sub. (2) of § 940.09. Regarding the defense, see Wis JI-Criminal 2600, Sec. X.

This instruction is a combination of Wis JI-Criminal 1185 and 1186. It attempts to streamline the instructions in a two-charge case by avoiding the reading of the complete instruction for each charge.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. See sub. (1c)(a) and sub. (1c)(b). Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09 was revised by 2019 Wisconsin Act 31. The offense definition did not change but sub. (1c)(a) and (b) were amended to require a mandatory minimum term of five years confinement unless the court finds "a compelling reason and places its reason on the record." [The effective date of Act 31 is November 22, 2019; but this date does not preclude the counting of other convictions, suspensions, or revocations as prior convictions, suspensions, or revocations for purposes of administrative action by the department of transportation or sentencing court.]

For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

1. This instruction is drafted for cases involving the influence of an intoxicant, which is defined to include "an alcohol beverage, hazardous inhalant, . . . a controlled substance or controlled substance analog under ch. 961, . . . any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or . . . any other drug, or . . . an alcohol beverage and any other drug." See § 939.22(42) in note 9, below. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

2. This statement is the equivalent of Wis JI-Criminal 115, One Defendant: Two Counts. If Wis JI-Criminal 115 is also given, the sentence need not be repeated here.

3. This statement is the equivalent of Wis JI-Criminal 484, . . . One Defendant: Two Counts . . . If Wis JI-Criminal 484 is also given, the sentence need not be repeated here.

4. This instruction is drafted for cases involving the influence of an intoxicant. See note 1, supra.

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5. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

6. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 15, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of death as required by the second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been under the influence and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

9. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. The definition in the instruction paraphrases the full definition provided in § 939.22(42):

> "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or of any other drug or of an alcohol beverage and any other drug.

Note: "hazardous inhalant" was added to the definition in § 939.22(42) by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013]. Act 83 also created a definition of "hazardous inhalant" in § 939.22(15).

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For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

11. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

14. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

15. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant or did not have [a prohibited] alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

16. See note 15, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

17. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

18. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

19. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of

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§§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

20. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 18, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

21. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and
2) not guilty even though the elements have been proved, because the defense has been established.

A separate set of closing paragraphs is presented for each count in an attempt to avoid confusion that may result from combining consideration of the two counts and the possible defenses.

22. See note 21, supra.

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1237 BATTERY TO AN EMERGENCY MEDICAL CARE PROVIDER[1] — § 940.20(7)

Statutory Definition of the Crime

Section 940.20(7) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to an (identify appropriate category for the victim),[2] where at the time of the act the defendant knows or has reason to know that the victim is an (identify appropriate category for the victim) acting in an official capacity and there is no consent of the victim harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.[3]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

2. (Name of victim) was a (identify appropriate category for the victim). [A _____ is (identify appropriate category for the victim).][5]

3. (Name of victim) was acting in an official capacity.

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This means (name of victim) was performing duties that (he) (she) was employed[6] to perform.[7] [The duties of a _____ include: _____.][8]

4. The defendant knew, or had reason to know, that (name of victim) was acting in an official capacity.[9]

5. (Name of victim) did not consent to the causing of bodily harm.

6. The defendant acted intentionally.

This requires that the defendant intended to cause bodily harm to (name of victim) and knew that (name of victim) did not consent to the causing of bodily harm.[10]

Intent to cause bodily harm means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that his conduct was practically certain to cause bodily harm to another.[11]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[12]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1237 was originally published in 1996 and revised in 2004, 2008, and 2018. This revision was approved by the Committee in June 2020; it reflects statutory amendments made by 2019 Wisconsin Act 97.

Section 940.20(7) was created by 1995 Wisconsin Act 145 (effective date: March 20, 1996).

2017 Wisconsin Act 12 [effective date: June 23, 2017] changed the terminology used in the statute from "emergency medical technician" to "emergency medical services practitioner" and from "first responder" to "emergency medical responder."

2019 Wisconsin Act 97 [effective date: February 7, 2020] added the category of "a health care provider who works in a hospital" to the list of applicable victims. The Act also amended the definition of "emergency department."

1. The statute applies to five different categories of person; for each category, the statute provides a full or partial definition. The instruction provides a blank where it is necessary to identify the category applicable to the victim. The category is to be defined, if necessary, in the second element.

2. Identify the appropriate category for the victim in this blank and the other blanks in the instruction: a health care provider who works in a hospital; emergency department worker; emergency medical services practitioner; emergency medical responder; or ambulance driver. The terms will be defined, if necessary, in the second element.

3. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. If it is believed to be necessary, provide a definition for the type of victim involved. For "emergency department worker," see § 940.20(7)(a)2. For "emergency medical services practitioner," § 940.20(7)(a)2g provides that the definition in § 256.01(5) applies. For "emergency medical responder,"

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§ 940.20(7)(a)2d provides that the definition in § 256.01(4p) applies. For "ambulance driver" § 940.20(7)(a)1e provides that the definition of "ambulance" in § 256.01(1t) applies.

§ 940.20(7)(a) provides: "'Emergency department' means a room or area in a hospital that is primarily used to provide emergency care, diagnosis or radiological treatment."

§ 940.20(7)(a)3 provides: "'health care provider' means any person who is licensed, registered, permitted or certified by the department of health services or the department of safety and professional services to provide health care services in this state." For "hospital" § 940.20(7)(a)4 provides that the definition in § 50.33 (2) applies.

6. "Employed" is used here in the general sense of being engaged or involved in performing a duty or service.

7. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

8. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

9. The "knew or had reason to know" requirement is taken directly from § 940.20(7)(b). It is treated as a separate element rather than being combined with the sixth element where knowledge of lack of consent is addressed. This is because the "reason to know" standard differs from the actual knowledge that is required when the word "intentionally" is used in a criminal statute. See § 939.23(3).

The instruction applies the "reason to know" standard to the victim's status as an emergency medical care provider and to "acting in an official capacity." The statute expressly applies "reason to know" only to status as an officer or employee. But the two requirements are so closely connected that the Committee concluded the same knowledge standard has to apply to each.

10. Knowledge that the victim was acting in an official capacity and that the victim did not consent is required because the word "intentionally" is used in the statute. That requires not only intent to cause bodily harm but also "knowledge of those facts necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'." § 939.23(3).

11. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

12. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee has concluded that this shorter version is appropriate for most cases. The complete, traditional, statement is found at Wis JI-Criminal 923A.

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1240B THREAT TO A JUDGE — § 940.203(2)

Statutory Definition of the Crime

Section 940.203 of the Criminal Code of Wisconsin is violated by one who intentionally threatens to cause bodily harm to the (person) (family member) of any judge where at the time of the act the person knows[1] that the victim is a (judge) (family member of a judge), the act is in response to an action taken in the judge's official capacity,[2] and there is no consent by the person harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause bodily harm to (name of victim).

   [A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][3]

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"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

2. (Name of victim) was a (judge) (family member of a judge).

[For the purpose of this offense, a (e.g., circuit court judge) is a judge.][5]

[For the purpose of this offense, a (e.g., child) is a family member.][6]

3. The defendant knew[7] that (name of victim) was a (judge) (family member of a judge).

4. The threat was in response to an action taken in the judge's official capacity.

Judges act in an official capacity when they perform duties that they are employed[8] to perform.[9] [The duties of a judge include: _____].[10]

5. The defendant threatened to cause bodily harm to (name of victim) without the consent[11] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to threaten bodily harm to another human being.[12]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1240A was originally published in 1994 and revised in 2002, 2016, 2018, and 2019. The 2002 revision divided the single instruction into two instructions, WI JI-Criminal 1240A and 1240B. Wis JI-Criminal 1240A was revised in 2008 to change the definition of "official capacity." The 2016 revision updated the Comment to reflect changes made by the 2015 Wisconsin Act 78. The 2018 revision reflected changes made by 2017 Wisconsin Act 272 and 2017 Wisconsin Act 352. This instruction was revised in 2020 to include the definition of "true threat" under element one, as well as correct a typographical error in element six.

Section 940.203 was created by 1993 Wisconsin Act 50 [effective date: November 25, 1993] and originally applied only to the offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 [effective date: April 13, 2018] to include officers of the court. 2017 Wisconsin Act 352 [effective date: April 18, 2018] amended the definitions of "judge" and "law enforcement officer." This instruction is drafted for violations under § 940.203 involving threats to a judge; for violations based on battery to a judge, see Wis-JI Criminal 1240A. For battery and threats to prosecutors and law enforcement officers, see Wis JI-Criminal 1240C and 1240D. For battery and threats to a current or former guardian ad litem, corporation counsel, or attorney, see Wis JI-Criminal 1241A and 1241B.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the prosecutor's or law enforcement officer's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. 2015 Wisconsin Act 109 amended § 940.203 to delete what was previously an alternative for this aspect of the offense definition: "... the judge is acting in an official capacity at the time of the act or threat..."

3. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, 28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court

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stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of the statute criminalizing language is much narrower." 2001 WI 46, 43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, 29.

The Committee concluded that the definition in the instruction is equivalent in context and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, 23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6 which requires that "the defendant acted with the mental purpose to threaten bodily harm to another…"

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. Section 940.203(1)(b) provides a definition of "judge" for the purpose of this offense. As amended by 2017 Wisconsin Act 352 that definition provides: "'Judge' means a person who currently is or who formerly was a supreme court justice, court of appeals judge, circuit court judge, municipal judge, tribal judge, temporary or permanent reserve judge or circuit, supplemental, or municipal court commissioner."

The applicable term should be inserted in the blank.

6. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

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The applicable term should be inserted in the blank.

7. See note 1, supra.

8. "Employed" is used here in the general sense of being engaged in the performance of a duty.

9. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

10. The duties of judges may be set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

11. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

12. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

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1250 FIRST DEGREE RECKLESS INJURY — § 940.23(1)

Statutory Definition of the Crime

First degree reckless injury, as defined in § 940.23(1) of the Criminal Code of Wisconsin, is committed by one who recklessly causes great bodily harm to another human being under circumstances that show utter disregard for human life.

State's Burden of Proof

Before you may find the defendant guilty of first degree reckless injury, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing great bodily harm.[1]

   "Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.[2]

2. The defendant caused great bodily harm by criminally reckless conduct.

   "Criminally reckless conduct" means:[3]

   - the conduct created a risk of death or great bodily harm to another person; and

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- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[4]

3. The circumstances of the defendant's conduct showed utter disregard[5] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life;[6] and, all other facts and circumstances relating to the conduct.

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[7]

[Consider also the defendant's conduct after the great bodily harm to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the great bodily harm occurred.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense were present, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1250 was originally published in 1962 and revised in 1989, 2002, and 2012 and 2015. The 2012 revision added the material at footnote 7. The 2015 revision revised footnote 4 to reflect

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2013 Wisconsin Act 307. The Comment was updated in April 2019. A "Reporter's Note" was removed in 2020.

This instruction is for a violation of § 940.23(1), as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The amended statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

First degree reckless injury replaces what was called "injury by conduct regardless of life" under prior law.

The homicide revision also created § 940.23(2), Second Degree Reckless Injury. See Wis JI Criminal 1252.

In State v. Kloss, 2019 WI App 13, 386 Wis.2d 314, 925 N.W.2d 563, the court of appeals held that solicitation of first-degree reckless injury is a crime and that solicitation of first degree recklessly endangering safety is a lesser included offense thereof.

1. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

2. See § 939.22(14) and Wis JI-Criminal 914.

3. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

4. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been

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aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information."

5. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life":

First-degree reckless homicide is analogous to the prior offense of 2nd-degree murder. The concept of "conduct evincing a depraved mind, regardless of human life" has been a difficult one for modern juries to comprehend. To avoid the mistaken connotation that a clinical mental disorder is involved, the offense has been recodified as aggravated reckless homicide. The revision clarifies that a subjective mental state, i.e., criminal recklessness, is required for liability. See s. 939.24, stats. The aggravating element, i.e., circumstances which show utter disregard for human life, is intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of human life." State v. Dolan, 44 Wis.2d 68, 170 N.W.2d 822 (1969); State v. Weso, 60 Wis.2d 404, 210 N.W.2d 442 (1973).

Note to § 940.02, 1987 Senate Bill 191.

The Dolan and Weso cases do not contain significant definitions themselves but rather cite with approval Wis JI-Criminal 1345 (© 1962), which used the phrase "utter lack of concern for the life and safety of another."

The Committee concluded that no further definition of the phrase "utter disregard" was necessary. The jury should be able to give the phrase a common sense meaning in determining whether the conduct is such that it amounts to aggravated reckless homicide offense.

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A phrase with essentially the same meaning is used in the Model Penal Code. Section 2.02(1)(b) provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Commentary to § 2.02(1)(b) explains that whether conduct demonstrates "extreme indifference" "is not a question . . . that can be further clarified." Attempts to explain the term by reference to common law concepts, says the Commentary, suffer from lack of clarity, and "extreme indifference" is simpler and more direct than other attempts to reformulate the common law.

The Judicial Council Committee considered the Model Penal Code formulation but opted for "utter disregard," apparently on the grounds that it would more clearly tie in with prior case law which could be referred to for examples of the kind of conduct that is intended to be covered by first degree reckless homicide under the revised statutes.

For discussions of "conduct evincing a depraved mind, regardless of human life" under prior law, see, e.g., Balistreri v. State, 83 Wis.2d 440, 265 N.W.2d 290 (1978); Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977); and Seidler v. State, 64 Wis.2d 456, 219 N.W.2d 320 (1974). In State v. Geske, 2012 WI App 15, 339 Wis.2d 170, 810 N.W.2d 226, the defendant, convicted of first degree reckless homicide, challenged the sufficiency of the evidence on the "utter disregard" element. Relying on the Wagner and Balistreri cases, she argued that her swerve just before the collision showed some regard for human life. The court held that the evidence of the swerve had to be considered in the context of all the circumstances: "A legally intoxicated person driving over eighty miles per hour through the city could not reasonably expect to avoid any collision by swerving at the last moment. Given the totality of the situation here, Geske's ineffectual swerve failed to demonstrate a regard for human life." ¶18.

The meaning of "utter disregard for human life" was discussed in State v. Jensen, 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170. The court relied on Weso, supra, to conclude that the phrase identifies an objective standard. The court noted:

> Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such, need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind-by the defendant's statements, for example, before, during and after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the victim, for example, or evidence of a particularly obvious, potentially lethal danger. However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. ¶17.

The Committee considered changing the instruction in response to Jensen, but concluded that the text accurately conveys a standard consistent with the decision. Jensen concluded that the standard could be understood and applied "without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges." ¶29. The Committee concluded that the instruction could also be properly applied without attempting to articulate "categorical rules."

Also see, State v. Edmunds, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), which, like Jensen, reviewed the application of the "utter disregard . . ." standard to a "shaken baby" case.

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6. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. These circumstances would include facts relating to the possible provocation of the defendant:

> Under prior law, adequate provocation mitigated 2nd-degree murder to manslaughter. State v. Hoyt, 21 Wis.2d 284, 124 N.W.2d 47 (1965). Under this revision, the analogs of those crimes, i.e., first-degree reckless and 2nd-degree intentional homicide, carry the same penalty; thus mitigation is impossible. Evidence of provocation will usually be admissible in prosecutions for crimes requiring criminal recklessness, however, as relevant to the reasonableness of the risk (and, in prosecutions under this section, whether the circumstances show utter disregard for human life). Since provocation is integrated into the calculus of recklessness, it is not an affirmative defense thereto and the burdens of production and persuasion stated in s. 940.01(3), stats., are inapplicable.
>
> Judicial Council Note to § 940.02, 1987 Senate Bill 191.

7. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. The decision reversed a decision of the court of appeals which had reversed Burris' conviction for 1st degree reckless injury. The court of appeals reversed because the trial court's response to a jury question about whether after-the-incident conduct should be considered in evaluating whether "the circumstances show utter disregard for human life" was potentially misleading. The supreme court held:

> ¶7 We conclude that, in an utter disregard analysis, a defendant's conduct is not, as a matter of law, assigned more or less weight whether the conduct occurred before, during, or after the crime. We hold that, when evaluating whether a defendant acted with utter disregard for human life, a fact-finder should consider any relevant evidence in regard to the totality of the circumstances.

The court also held, that under the facts of the Burris case, "the supplemental instruction did not mislead the jury into believing that it could not consider Burris's relevant after-the-fact conduct in its determination on utter disregard for human life." ¶8.

The court recommended that the Committee address this issue in the jury instructions:

> ¶64 . . . [S]upplemental instructions such as the one given here, taken out of context from Jensen, do have the potential to be confusing. Thus, we recommend that the Criminal Jury Instruction Committee, in its comments to the "first-degree reckless" offense instructions, Wis JI-Criminal 1016-22, 1250, and the utter disregard for human life instruction, Wis JI-Criminal 924A, advise against taking certain language directly from utter disregard cases such as Jensen without providing the necessary context to fully explain the proper inquiry. Additionally, we recommend that the Committee consider revising these instructions to more explicitly direct the jury that, in its utter disregard for human life consideration, it should consider the totality of the circumstances including any relevant evidence regarding a defendant's conduct before, during, and after the crime.

The addition to the instruction referring to after-the-fact conduct is intended to address the court's suggestions. The committee decided it was not necessary to include a reference to conduct before or

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during the act because the paragraph immediately preceding the addition calls the jury's attention to "what the defendant was doing" and "all the other facts and circumstances relating to the conduct." Juries will rarely have questions about the relevance of conduct before and during the act but they may have questions about the after-fact-conduct, as the jury in the Burris case did.

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1273 LAW ENFORCEMENT OFFICER[1] — FAILURE TO RENDER AID — § 940.291

Statutory Definition of the Crime

Failure to render aid by a law enforcement officer, as defined in § 940.291 of the Criminal Code of Wisconsin, is committed by a peace officer[2] who, while acting in the course of employment or under the authority of employment, [intentionally fails to render or make arrangements for any necessary first aid[3]] [knowingly permits another person to intentionally fail to render or make arrangements for any necessary first aid] for any person in his or her actual custody if bodily harm results from the failure.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a peace officer acting (in the course of) (under the authority of) employment.
2. The defendant had (name of victim) in his or her actual custody.[4]

   "Custody" means that a person's freedom of movement is restricted either by the use of physical force by a peace officer or by the assertion of authority by a peace officer to which the person has submitted.[5]

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3. The defendant [intentionally failed to (render) (make arrangements for) any necessary first aid] [knowingly permitted another person to intentionally fail to (render) (make arrangements for) any necessary first aid] to (name of victim). [6]

The term "intentionally" means that the defendant knew (name of victim) had a need for first aid and purposely failed to (render) (make arrangements for) the necessary first aid. [7]

IF FAILURE TO RENDER AID IS ALLEGED, USE THE FOLLOWING:

["Intentionally failed to render aid" requires that the defendant had the knowledge and the ability to render the first aid that was necessary.]

4. The failure to render or make arrangements for first aid resulted in bodily harm to (name of victim).

"Bodily harm" means physical pain or injury, illness, or any impairment or physical condition. [8]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

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If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1273 was approved by the Committee in February 2020.

Section 940.291 was created by 1983 Wisconsin Act 27 (effective date: July 13, 1983).

1. Although the title of the statute uses the term "law enforcement officer," the Committee concluded that the term "peace officer" more accurately reflects the intent of the legislature as it is the term utilized within the actual text of the statute. Section 990.001(6) provides: "The titles to subchapters, sections, subsections, paragraphs and subdivisions of the statutes and history notes are not part of the statutes."

2. "Peace officer" is defined in Wis. Stat. § 939.22(22) as follows:

"'Peace officer' means any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes."

3. "A violation for intentionally failing to render first aid under this subsection applies only to first aid which the officer has the knowledge and ability to render." Wis. Stat. § 940.291(1).

4. "This subsection applies whether the custody is lawful or unlawful and whether the custody is actual or constructive." Wis. Stat. § 940.291(1).

5. The definition of "custody" is adapted from decisions of the Wisconsin Supreme Court and Court of Appeals. These decisions held that the proper definition of custody was broader than being in the "physical control" of a police officer or institution guard. Rather, it is enough if freedom of movement has been restricted. State v. Adams, 152 Wis.2d 68, 447 N.W.2d 90 (Ct. App. 1989); State v. Hoffman, 163 Wis.2d 752, 472 N.W.2d 558 (Ct. App. 1991); State v. Swanson, 164 Wis.2d 437, 475 N.W.2d 437 (1991). See footnote 4, Wis JI-Criminal 1772 for complete discussion of these cases.

6. This offense is essentially based on a failure to act, i.e., an omission. The offense definition incorporates the equivalents of the common law requirements for omission liability: a legal duty, knowledge of facts giving rise to the duty, ability to act, and failure to act as the duty requires. For a full discussion, see Wis JI-Criminal 905.

7. The word "intentionally" is defined to include two aspects: knowledge and purpose. The knowledge requirement is based on § 939.23(3) which provides that when the word "intentionally" is used, it requires that the actor must have knowledge of those facts which apply to make his or her conduct criminal and which are set forth after the word "intentionally." The purpose requirement is based on one of the two definitions of intent provided in § 939.23(3). The first is mental purpose to cause the result. The other is being aware that one's conduct is practically certain to cause the result. See Wis Criminal JI 923A.

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The Committee concluded that the mental purpose alternative is most likely to apply in situations consisting of purposeful dereliction of duty. However, there may be scenarios that require the practically certain to cause the result alternative. See Wis JI-Criminal 923A and 923B.

8. This is the definition of "bodily harm" provided in § 939.22(4).

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1292 INTIMIDATION OF A WITNESS — §§ 940.42 and 940.43

Statutory Definition of the Crime

Intimidation of a witness, as defined in § 940.42 of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] any witness from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a witness.

   "Witness" means any person who has been called to testify or who is expected to be called to testify.[2]

2. The defendant (prevented) (dissuaded)[3] (attempted to prevent) (attempted to dissuade) (name of victim) from attending or giving testimony at a proceeding authorized by law.

   (A (name of proceeding) is a proceeding authorized by law.)[4]

3. The defendant acted knowingly and maliciously.[5]

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This requires that the defendant knew (name of victim) was a witness and that the defendant acted with the purpose to prevent (name of victim) from (attending) (testifying).

Deciding About Knowledge and Purpose

You cannot look into a person's mind to find knowledge and purpose. Knowledge and purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and purpose.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty [and answer the following question "yes" or "no"].[7]

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.43 IS ESTABLISHED:[8]

If you find the defendant guilty, you must answer the following question:

[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of witness)] [(identify relative)[9] of (name of witness)]?"]

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[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of witness)] [(identify relative)[10] of (name of witness)]?"]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.43)?"][11]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][12]

[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?"]

[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

[FOR CHARGES UNDER SUB. (7)][13]

[Did the defendant commit the act in connection with a trial, proceeding, or inquiry in a felony case in which he was charged?]

[FOR CHARGES UNDER SUB. (8)][14]

[Was the proceeding a criminal trial where the crime charged was an act of domestic abuse[15] or one subject to a domestic abuse surcharge?][16]

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[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES:]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1292 was originally published in 1982 and revised in 1987, 1994, 1998, 2001, 2006, and 2010. The 2001 revision changed the instruction to apply to both misdemeanor and felony offenses; it also replaced Wis JI-Criminal 1290 and 1292A. The 2006 revision added reference to sub. (7) of § 940.43, which was created by 2005 Wisconsin Act 280. See footnote 13. The 2020 revision added reference to sub. (8) of § 940.43, which was created by 2019 Wisconsin Act 112. See footnote 14.

This instruction is drafted for use in both misdemeanor and felony charges under §§ 940.42 and 940.43. The definition of the three basic elements is based on § 940.42 and is to be used in both felony and misdemeanor prosecutions; for felony offenses, a question is to be added so that the jury makes a finding whether the fact presented in the question is proved. Each of the facts specified in subs. (1)-(8) increases the penalty to that for a Class G felony.

Sections 940.41 through 940.49, relating to intimidation of victims and witnesses, were created by Chapter 118, Laws of 1981. They were based on a model statute proposed in 1979 by the Committee on Victims, American Bar Association Section of Criminal Justice.

Several other statutes define criminal offenses directed against a witness:

§ 940.201 Battery of Threat to Witness (See Wis JI-Criminal 1238 and 1239)
§ 943.011 Damage or Threat to Property of a Witness (See Wis JI-Criminal 1400B)
§ 946.61 Bribery of Witnesses

In State v. Moore, 2006 WI App 61, 292 Wis.2d 101, 713 N.W.2d 131, the court affirmed convictions for 14 counts of intimidating a witness. The evidence was sufficient to prove Moore attempted to intimidate the second witness/victim by letters written to the first witness/victim. Charging 14 counts based on 7 letters attempting to dissuade two witnesses did not violate the rules against multiplicity – there is no evidence of legislative intent to limit the number of charges.

1. Section 940.42 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

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Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

> Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from attending or giving testimony and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from attending or giving testimony except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The definition of "witness" in the instruction is a simplified version of the definition provided in § 940.41(3):

> (3) "Witness" means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who has provided information concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under s. 885.01 or under the authority of any court of this state or of the United States.

Subsection 940.41(1g) provides that "law enforcement agency" has the meaning specified in § 165.83(1)(b).

Reading the statutory definition of "witness" in the context of the required elements of the crime led the Committee to conclude that the simplified version would be suitable for most cases. The facts of a particular situation may require more complete incorporation of the provisions of § 940.41(3).

3. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

4. The Committee concluded that using the phrase "proceeding authorized by law" would cover the longer phrase used in the statute: "trial, proceeding or inquiry authorized by law." The broader term, "proceeding," would clearly include "trial" and "inquiry."

Most "proceedings authorized by law" will be authorized by a specific section of the statutes. When there is specific statutory authority, the Committee believes this may be communicated to the jury by stating, for example: "A John Doe hearing is a proceeding authorized by law."

5. Section 940.42 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and

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"maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

> (1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

6. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

7. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

8. Section 940.43 specifies eight different facts that increase the penalty for the basic misdemeanor offense to that for a Class G felony. A bracketed question is provided for each statutory option.

9. The penalty increase provided by § 940.43(1) applies to the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

10. The same relatives are covered as under sub. (1) of the statute. See note 9, supra.

11. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

12. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

13. This option was added to reflect the alternative created by 2005 Wisconsin Act 280. [Effective date: April 20, 2006.] The question is a paraphrase of the statute, which reads as follows: "(7) Where the act is committed by a person who is charged with a felony in connection with a trial, proceeding, or inquiry for that felony."

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14. This option was added to reflect the alternative created by 2019 Wisconsin Act 112. [Effective date: March 1, 2020.] The question is a paraphrase of the statute, which reads as follows: "(8) If the proceeding is a criminal trial, where the crime is an act of domestic abuse, as defined in s. 968.075(1)(a), that constitutes the commission of a crime or a crime that, following conviction, is subject to the surcharge in s. 973.055."

15. Subsection 968.075(1)(a) defines "domestic abuse" as follows:

"Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225 (1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

16. A person is subject to a domestic abuse surcharge of $100 if a person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain specified crimes and the court finds the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided, or against an adult with whom the adult person has created a child. See § 973.055.

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1296 INTIMIDATION OF A VICTIM — §§ 940.44 and 940.45

Statutory Definition of the Crime

Intimidation of a victim, as defined in § 940.44 of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] another person who has been the victim of any crime from making any report of the victimization to any peace officer or law enforcement agency.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a victim of a crime.

   "Victim" means a person against whom a crime has been committed or attempted in this state.[3]

   In this case, it is alleged that (name of victim) was a victim of (name of crime). (Name of crime), as defined in § ___ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).[4] Before you may find the defendant guilty of intimidation of a victim, you must be satisfied beyond a reasonable doubt that (name of victim) was the victim of (name of crime).

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2. The defendant (prevented) (dissuaded)[5] (attempted to prevent) (attempted to dissuade) (name of victim) from reporting the crime to any law enforcement agency.[6]

3. The defendant acted knowingly and maliciously.[7]

This requires that the defendant knew (name of victim) was a victim of a crime and that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty [and answer the following question "yes" or "no"].[9]

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.45 IS ESTABLISHED:[10]

If you find the defendant guilty, you must answer the following question:

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[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of victim)] [(identify relative)[11] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of victim)] [(identify relative)[12] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.45)?"][13]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][14]

[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?"]

[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

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[FOR CHARGES UNDER SUB. (7)][15]

[Was the proceeding a criminal trial where the crime charged was an act of domestic abuse[16] or one subject to a domestic abuse surcharge?][17]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES:]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1296 was originally published in 1987 and revised in 1991, 1994, 1998, 2001, and 2010. The 2001 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment. The revised instruction applies to both misdemeanor and felony offenses; it also replaces Wis JI-Criminal 1294. The 2020 revision added reference to sub. (7) of § 940.45, which was created by 2019 Wisconsin Act 112. See footnote 15.

This instruction is drafted for use in both misdemeanor and felony charges under §§ 940.44 and 940.45. A separate instruction is drafted for cases involving intimidation of a person acting on behalf of a victim. See Wis JI-Criminal 1296A.

The definition of the three basic elements is based on § 940.44 and is to be used in both felony and misdemeanor prosecutions; for felony offenses, a question is to be added so that the jury makes a finding whether the fact presented in the question is proved. Each of the facts specified in subs. (1)-(7) increases the penalty to that for a Class G felony.

Sections 940.41 through 940.49, relating to intimidation of victims and witnesses, were created by Chapter 118, Laws of 1981. They were based on a model statute proposed in 1979 by the Committee on Victims, American Bar Association Section of Criminal Justice.

1. Section 940.44 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

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Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from making a report except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The concluding phrase of this paragraph, ". . . from making any report of the victimization to any peace officer or law enforcement agency," is a simplified paraphrasing of subsec. (1) of 940.44. There are two other subsections that are not addressed by the instruction. The three subsections read as follows:

(1) Making any report of the victimization to any peace officer or state, local or federal law enforcement or prosecuting agency, or to any judge.
(2) Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof. [See Wis JI-Criminal 1297.]
(3) Arresting or causing or seeking the arrest of any person in connection with the victimization.

3. The definition of "victim" in the instruction is a simplified version of the definition provided in § 940.41(2):

(2) "Victim" means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

4. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime against the victim as well as with trying to intimidate that victim. In those situations, Wis JI-Criminal 1294 would be given after the jury had been instructed on the essential facts of the underlying

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crime and detailed recapitulation of those facts ought not to be necessary in Wis JI-Criminal 1294. If the jury has not been instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, supra.

5. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

6. This statement substitutes "reporting the crime" for the statute's "report of the victimization" on the grounds that it means the same thing and will be more understandable. The second element reflects one alternative of several that are possible under the statute. See note 2, supra.

7. Section 940.44 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and "maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

> (1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

8. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly JI 923.1].

9. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

10. Section 940.45 specifies seven different facts that increase the penalty for the basic misdemeanor offense to that for a Class G felony. A bracketed question is provided for each statutory option.

11. The penalty increase provided by § 940.45(1) applies to the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

12. The same relatives are covered as under sub. (1) of the statute. See note 11, supra.

13. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the

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subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

14. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

15. This option was added to reflect the alternative created by 2019 Wisconsin Act 112. [Effective date: March 1, 2020.] The question is a paraphrase of the statute, which reads as follows: "(7) Where the underlying crime is an act of domestic abuse, as defined in s. 968.075(1)(a), that constitutes the commission of a crime or a crime that, following a conviction, is subject to the surcharge in s. 973.055."

16. Subsection 968.075(1)(a) defines "domestic abuse" as follows:

> "Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:
>
> 1. Intentional infliction of physical pain, physical injury or illness.
> 2. Intentional impairment of physical condition.
> 3. A violation of s. 940.225 (1), (2) or (3).
> 4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3..

17. A person is subject to a domestic abuse surcharge of $100 if a person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain specified crimes and the court finds the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided, or against an adult with whom the adult person has created a child. See § 973.055.

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1296A INTIMIDATION OF A PERSON ACTING ON BEHALF OF A VICTIM — §§ 940.44 and 940.45

Statutory Definition of the Crime

Intimidation of a person acting on behalf of a victim, as defined in § 940.44 of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] a person who is acting on the behalf of the victim of any crime from making any report of the victimization to any peace officer or law enforcement agency.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim)[3] was a victim of a crime.

   "Victim" means a person against whom a crime has been committed or attempted in this state.[4]

   In this case, it is alleged that (name of crime victim) was a victim of (name of crime). (Name of crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).[5] Before you may find the defendant guilty of intimidation of a person acting on behalf of a victim, you must be

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satisfied beyond a reasonable doubt that (name of crime victim) was the victim of (name of crime).

2. (Name of person acting on behalf of crime victim)[6] was acting on behalf of (name of crime victim).

3. The defendant (prevented) (dissuaded)[7] (attempted to prevent) (attempted to dissuade) (name of person acting on behalf of crime victim) from reporting the crime to any law enforcement agency.[8]

4. The defendant acted knowingly and maliciously.[9]

This requires that the defendant knew (name of crime victim) was a victim of a crime and knew that (name of person acting on behalf of crime victim) was acting on behalf of (name of crime victim). This also requires that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[10]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty [and answer the following question "yes" or "no"].[11]

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.45 IS ESTABLISHED:[12]

If you find the defendant guilty, you must answer the following question:

[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of victim)] [(identify relative)[13] of (name of victim)]?"][14]

[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of victim)] [(identify relative)[15] of (name of victim)]?"][16]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.45)?"][17]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][18]

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[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?"]

[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

[FOR CHARGES UNDER SUB. (7)][19]

[Was the proceeding a criminal trial where the crime charged was an act of domestic abuse[20] or one subject to a domestic abuse surcharge?][21]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1296A was originally published in 2001 and revised in 2010. The 2020 revision added reference to sub. (7) of § 940.45, which was created by 2019 Wisconsin Act 112. See footnote 19.

This instruction adapts Wis JI-Criminal 1296 for charges alleging intimidation of a person acting on behalf of a crime victim. It is drafted for use in both misdemeanor and felony charges under §§ 940.44 and 940.45. The definition of the four basic elements is to be used in both situations; for felony offenses, a question is to be added so that the jury makes a finding as to whether the fact embodied in the question is proved. Each of the facts increases the penalty to that for a Class G felony.

See the Comment to Wis JI-Criminal 1296 for general information about §§ 940.41-940.49.

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1. Section 940.44 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

> Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from making a report except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The concluding phrase of this paragraph, ". . . from making any report of the victimization to any peace officer or law enforcement agency," is a simplified paraphrasing of subsec. (1) of 940.44. There are two other subsections that are not addressed by the instruction. The three subsections read as follows:

> (1) Making any report of the victimization to any peace officer or state, local or federal law enforcement or prosecuting agency, or to any judge.
> (2) Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof. [See Wis JI-Criminal 1297.]
> (3) Arresting or causing or seeking the arrest of any person in connection with the victimization.

3. Where the instruction calls for the "name of crime victim" use the name of the person who is alleged to be the victim of the underlying crime. The victim of the offense defined in this instruction is indicated by blanks labeled "name of person acting on behalf of the crime victim." See note 4, below.

4. The definition of "victim" in the instruction is a simplified version of the definition provided in § 940.41(2):

> (2) "Victim" means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

5. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

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> The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime against the victim as well as with trying to intimidate that victim. In those situations, Wis JI-Criminal 1296A would be given after the jury had been instructed on the essential facts of the underlying crime and detailed recapitulation of those facts ought not to be necessary in Wis JI-Criminal 1296A. If the jury has not been instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, supra.

6. Where the instruction calls for the "name of person acting on behalf of crime victim" use the name of the person who is alleged to be the victim of the crime defined by this instruction. The victim of the underlying crime is referred to in the instruction as the "crime victim." See note 3, supra.

7. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

8. This statement substitutes "reporting the crime" for the statute's "report of the victimization" on the grounds that it means the same thing and will be more understandable. The second element reflects one alternative of several that are possible under the statute. See note 2, supra.

9. Section 940.44 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and "maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

> (1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

10. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly JI 923.1].

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11. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

12. Section 940.45 specifies seven different facts that increase the penalty for the basic misdemeanor offense to that for a Class G felony. A bracketed question is provided for each statutory option.

13. The penalty increase provided by § 940.45(1) applies the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

14. The Committee concluded that the aggravating factors described in subs. (1), (2), and (3) apply only to acts against the victim of the underlying crime and not to acts against the person acting on behalf of the crime victim.

15. The same relatives are covered as under sub. (1) of the statute. See note 13, supra.

16. The Committee concluded that the aggravating factors described in subs. (1), (2), and (3) apply only to acts against the victim of the underlying crime and not to acts against the person acting on behalf of the crime victim.

17. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

The Committee concluded that the aggravating factors described in subs. (1), (2) and (3) apply only to acts against the victim of the underlying crime and not to acts against the person acting on behalf of the crime victim.

18. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

19. This option was added to reflect the alternative created by 2019 Wisconsin Act 112. [Effective date: March 1, 2020.] The question is a paraphrase of the statute, which reads as follows: "(7) Where the underlying crime is an act of domestic abuse, as defined in s. 968.075(1)(a), that constitutes the commission of a crime or a crime that, following a conviction, is subject to the surcharge in s. 973.055."

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20. Subsection 968.075(1)(a) defines "domestic abuse" as follows:

"Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225 (1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

21. A person is subject to a domestic abuse surcharge of $100 if a person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain specified crimes and the court finds the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided, or against an adult with whom the adult person has created a child. See § 973.055.

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1297 INTIMIDATION OF A VICTIM — §§ 940.44(2) and 940.45

Statutory Definition of the Crime

Intimidation of a victim, as defined in § 940.44(2) of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] another person who has been the victim of any crime from causing a complaint, indictment, or information to be sought and prosecuted and assisting in the prosecution thereof.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a victim of a crime.

   "Victim" means a person against whom a crime has been committed or attempted in this state.[2]

   In this case, it is alleged that (name of victim) was a victim of (name of crime). (Name of crime), as defined in § ___ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).[3] Before you may find the defendant guilty of intimidation of a victim, you must be satisfied beyond a reasonable doubt that (name of victim) was the victim of (name of crime).

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2. The defendant (prevented) (dissuaded)[4] (attempted to prevent) (attempted to dissuade) (name of victim) from [causing a (complaint) (indictment) (information) to be sought] (or) [causing a (complaint) (indictment) (information) to be prosecuted] (or) [assisting in the prosecution of a (complaint) (indictment) (information)].[5]

3. The defendant acted knowingly and maliciously.[6]

This requires that the defendant knew (name of victim) was a victim of a crime and that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. They must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty [and answer the following question "yes" or "no"].[8]

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.45 IS ESTABLISHED:[9]

If you find the defendant guilty, you must answer the following question:

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[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of victim)] [(identify relative)[10] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of victim)] [(identify relative)[11] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.45)?"][12]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][13]

[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?"]

[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

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[FOR CHARGES UNDER SUB. (7)][14]

[Was the proceeding a criminal trial where the crime charged was an act of domestic abuse[15] or one subject to a domestic abuse surcharge?][16]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES:]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1297 was originally published in 2010 and revised in 2016. The 2020 revision added reference to sub. (7) of § 940.45, which was created by 2019 Wisconsin Act 112. See footnote 14.

This instruction is drafted for use for both misdemeanor and felony charges under §§ 940.44(2) and 940.45. For violations of § 940.44(1) see Wis JI-Criminal 1296. A separate instruction is drafted for cases involving intimidation of a person acting on behalf of a victim. See Wis JI-Criminal 1296A.

Section 940.44(2) was amended by 2013 Wisconsin Act 14 [effective date: April 10, 2015] to codify the interpretation of the statute in State v. Freer, 2010 WI App 9, 323 Wis.2d 29, 779 N.W.2d 12. The text of the instruction already reflected the Freer interpretation so it was not affected by Act 14. See footnote 5, below.

The definition of the three basic elements is based on § 940.44(2) and is to be used in both felony and misdemeanor prosecutions; for felony offenses, a question is to be added so that the jury makes a finding whether the fact presented in the question is proved. Each of the facts specified in subs. (1)-(6) increases the penalty to that for a Class G felony.

Sections 940.41 through 940.49, relating to intimidation of victims and witnesses, were created by Chapter 118, Laws of 1981. They were based on a model statute proposed in 1979 by the Committee on Victims, American Bar Association Section of Criminal Justice.

1. Section 940.44 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

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If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

> Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from making a report except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The definition of "victim" in the instruction is a simplified version of the definition provided in § 940.41(2):

> (2) "Victim" means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

3. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

> The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime against the victim as well as with trying to intimidate that victim. In those situations, Wis JI-Criminal 1294 would be given after the jury had been instructed on the essential facts of the underlying crime and detailed recapitulation of those facts ought not to be necessary in Wis JI-Criminal 1294. If the jury has not been instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, supra.

4. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

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5. Subsection (2) of § 940.44 reads as follows: "Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof." The instruction provides for three alternatives as set forth in State v. Freer, 2010 WI App 9, 323 Wis.2d 29, 779 N.W.2d 12, which concluded that the statute was ambiguous because "'and' in the statutes is not always interpreted as a conjunctive term." The court relied on an LRB analysis of the bill to interpret the statute as though it read "or" instead of "and":

> In light of the LRB analysis, we conclude that the legislature intended the victim intimidation statute to prohibit any act of intimidation that seeks to prevent or dissuade a crime victim from assisting in the prosecution. Accordingly, we read "and" in the phrase "causing a complaint . . . to be sought and prosecuted and assisting in the prosecution thereof" in the disjunctive, and thereby conclude that Wis. Stat. § 940.44(2) prohibits knowingly or maliciously preventing or dissuading a crime victim from providing any one or more of the following forms of assistance to prosecutors: (1) causing a complaint, indictment or information to be sought; (2) causing a complaint to be prosecuted; or (3) assisting in the prosecution.
> 2010 WI App 9, ¶24.

Section 940.44(2) was amended by 2013 Wisconsin Act 14 [effective date: April 10, 2015] to codify the interpretation of the statute in Freer. The text of the instruction already reflected the Freer interpretation so it was not affected by Act 14.

6. Section 940.44 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and "maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

> (1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

7. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

8. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

9. Section 940.45 specifies seven different facts that increase the penalty for the basic misdemeanor offense to that for a Class D felony. A bracketed question is provided for each statutory option.

10. The penalty increase provided by § 940.45(1) applies to the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any

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person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

11. The same relatives are covered as under sub. (1) of the statute. See note 10, supra.

12. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

13. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

14. This option was added to reflect the alternative created by 2019 Wisconsin Act 112. [Effective date: March 1, 2020.] The question is a paraphrase of the statute, which reads as follows: "(7) Where the underlying crime is an act of domestic abuse, as defined in s. 968.075(1)(a), that constitutes the commission of a crime or a crime that, following a conviction, is subject to the surcharge in s. 973.055."

15. Subsection 968.075(1)(a) defines "domestic abuse" as follows:

> "Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:
>
> 1. Intentional infliction of physical pain, physical injury or illness.
> 2. Intentional impairment of physical condition.
> 3. A violation of s. 940.225 (1), (2) or (3).
> 4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

16. A person is subject to a domestic abuse surcharge of $100 if a person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain specified crimes and the court finds the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided, or against an adult with whom the adult person has created a child. See § 973.055.

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WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME IIA

Wisconsin Criminal Jury Instructions Committee

University of Wisconsin Law School

[Cite as Wis JI-Criminal]

• Includes Release No. 58

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1341B USING OLEORESIN OF CAPSICUM (PEPPER SPRAY)[1] OR CS GEL TO CAUSE BODILY HARM OR DISCOMFORT — § 941.26(4)(b)

Statutory Definition of the Crime

Section 941.26(4)(b) of the Criminal Code of Wisconsin is violated by one[2] who intentionally uses a device or container of (oleoresin of capsicum[3]) (CS gel) to cause bodily harm or bodily discomfort to another person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant used a device or container of (oleoresin of capsicum) (CS gel)[4] to cause bodily harm or bodily discomfort to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing bodily harm or discomfort.[5]

   ["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.][6]

2. The defendant acted intentionally.

   This requires that the defendant acted with the mental purpose to cause bodily harm or bodily discomfort to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.[7]

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It also requires that the defendant knew that the device or container contained (oleoresin of capsicum) (CS gel).[8]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1341 in 1994. It was revised and renumbered as Wis JI-Criminal 1341B in 2007 and revised again in 2014 to reflect changes made by 2013 Wisconsin Act 77. This revision was approved by the Committee in December 2019; it reflects changes made by 2019 Wisconsin Act 52.

This instruction is for one of several offenses contained in § 941.26(4) as amended by 1993 Wisconsin Act 91. Act 91 was enacted in December 1993 but with a delayed effective date of October 1, 1994. The criminal offenses involving "pepper spray" therefore apply only to conduct occurring on or after October 1, 1994.

The substance CS gel was added to the language of § 941.26 (4)(a) by 2019 Wisconsin Act 52 [effective date November 24, 2019].

See Wis JI-Criminal 1341C for violations of § 941.26(4)(d), using "pepper spray" to cause bodily harm or discomfort to a police officer.

See Wis JI-Criminal 1341D for violations of § 941.26(4)(L), possession of "pepper spray" by a convicted felon.

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1993 Wisconsin Act 91 also required the Department of Justice to enact administrative rules relating to the sale and distribution of oleoresin of capsicum products. Those rules are found in Chapter Jus 14, Wisconsin Administrative Code. 2013 Wisconsin Act 77 [effective date: December 13, 2013] created § 941.26(4m) to read: "The department of justice may not promulgate or enforce any rule that regulates a device or container described under para. (a)."

1. The statute uses the term "oleoresin of capsicum" to refer to the substance commonly known as "pepper gas," "pepper spray," or "pepper mace." Not all material commonly referred to by these terms may meet the requirements of § 941.26(4)(a), which provides, in effect, that the offenses defined in sub. (4) apply to "a device or container that contains a combination of oleoresin of capsicum or CS gel and inert ingredients but does not contain any other gas or substance that will cause bodily discomfort." § 941.26(4)(a). Thus, the instruction uses the statutory term "oleoresin of capsicum" throughout.

2. Subsection (4)(c) of § 941.26 provides that the criminal offense defined in subsec. (4)(b) does "not apply to any of the following:"

1. "Any person acting in self-defense or defense of another, as allowed under s. 939.48."

2. "Any peace officer acting in his or her official capacity."

3. "Any armed forces or national guard personnel acting in the line of duty."

The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925).

Factual disputes about the applicability of an exception would likely be determined by pretrial motion. If a factual dispute is raised at trial, the Committee concluded that they are best handled in the same manner as most "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

3. See note 1, supra.

4. "'CS gel' means nonatomizing, gel-form chlorobenzalmalononitrile. § 941.26(1c)(a)."

5. The Committee concluded that the "substantial factor" definition of "cause" is sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

6. This is the definition of "bodily harm" provided in § 939.22(4).

7. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

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8. The knowledge requirement is included because the statute uses the word "intentionally." Section 939.23(3) provides that this requires "purpose to do the thing or cause the result specified . . ." and "knowledge of those facts which are necessary to make his or her conduct criminal which are set forth after the word 'intentionally.'" The Committee concluded that the container or device being one that contains oleoresin of capsicum or CS gel is one of those facts. The Committee also concluded that is sufficient that the defendant know the substance by a common name, like "pepper spray," and not that the defendant know the exact chemical composition of the substance.

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1341C USING OLEORESIN OF CAPSICUM (PEPPER SPRAY)[1] OR CS GEL TO CAUSE BODILY HARM TO A PEACE OFFICER — § 941.26(4)(d)

Statutory Definition of the Crime

Section 941.26(4)(d) of the Criminal Code of Wisconsin is violated by one who intentionally uses a device or container of (oleoresin of capsicum)[2] (CS gel) to cause bodily harm or bodily discomfort to a peace officer and knows, or has reason to know, that the person is a peace officer acting in an official capacity.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant used a device or container of (oleoresin of capsicum) (CS gel)[3] to cause bodily harm or bodily discomfort to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing bodily harm or discomfort.[4]

   ["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.][5]

2. The defendant acted intentionally.

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This requires that the defendant acted with the mental purpose to cause bodily harm or bodily discomfort to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.[6]

It also requires that the defendant knew that the device or container contained (oleoresin of capsicum) (CS gel).[7]

3. (Name of victim) was a peace officer acting in an official capacity.

A (name type of officer) is a peace officer.[8]

(Name type of officer)[9] act in an official capacity when they perform duties that they are employed to perform. A (name type of officer) who performs acts for personal reasons that are not within the responsibilities of a (name type of officer) does not act in an official capacity.[10] [The responsibilities of a (name type of officer) include: _____.][11]

4. The defendant knew, or had reason to know, that (name of victim) was a peace officer acting in an official capacity.[12]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1341.1 in 1994. It was republished as Wis JI-Criminal 1341A in 1995. It was revised and renumbered as Wis JI-Criminal 1341C in 2007 and revised again in 2014 to reflect changes made by 2013 Wisconsin Act 77. This revision was approved by the Committee in December 2019; it reflects changes made by 2019 Wisconsin Act 52.

This instruction is for one of several offenses contained in § 941.26(4) as amended by 1993 Wisconsin Act 91. Act 91 was enacted in December 1993 but with a delayed effective date of October 1, 1994. The criminal offenses involving "pepper spray" therefore apply only to conduct occurring on or after October 1, 1994.

The substance CS gel was added to the language of § 941.26 (4)(a) by 2019 Wisconsin Act 52 [effective date November 24, 2019].

See Wis JI-Criminal 1341B for violations of § 941.26(4)(b), using "pepper spray" to cause bodily harm or discomfort to another person. See Wis JI-Criminal 1341D for violations of § 941.26(4)(L), possession of "pepper spray" by a convicted felon.

1993 Wisconsin Act 91 also required the Department of Justice to enact administrative rules relating to the sale and distribution of oleoresin of capsicum products. Those rules are found in Chapter Jus 14, Wisconsin Administrative Code. 2013 Wisconsin Act 77 [effective date: December 13, 2013] created § 941.26(4m) to read: "The department of justice may not promulgate or enforce any rule that regulates a device or container described under para. (a)."

1. The statute uses the term "oleoresin of capsicum" to refer to the substance commonly known as "pepper gas," "pepper spray," or "pepper mace." Not all material commonly referred to by these terms may meet the requirements of § 941.26(4)(a), which provides, in effect, that the offenses defined in sub. (4) apply to "a device or container that contains a combination of oleoresin of capsicum or CS gel and inert ingredients but does not contain any other gas or substance that will cause bodily discomfort." § 941.26(4)(a). Thus, the instruction uses the statutory term "oleoresin of capsicum" throughout.

2. See note 1, supra.

3. "'CS gel' means nonatomizing, gel-form chlorobenzalmalononitrile. § 941.26(1c)(a)."

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4. The Committee concluded that the "substantial factor" definition of "cause" is sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

5. This is the definition of "bodily harm" provided in § 939.22(4).

6. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

7. The knowledge requirement is included because the statute uses the word "intentionally." Section 939.23(3) provides that this requires "purpose to do the thing or cause the result specified . . ." and "knowledge of those facts which are necessary to make his or her conduct criminal which are set forth after the word 'intentionally.'" The Committee concluded that the container or device being one that contains oleoresin of capsicum or CS gel is one of those facts. The Committee also concluded that is sufficient that the defendant know the substance by a common name, like "pepper spray," and not that the defendant know the exact chemical composition of the substance.

8. In the Committee's judgment, the jury may be told, for example, that a sheriff is a peace officer. It is still for the jury to be satisfied that, in the example, the victim was a sheriff.

9. Use the plural form in the blank, e.g., "sheriff," "police officers," etc.

10. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

11. The duties, powers, or responsibilities of some peace officers are set forth in the Wisconsin statutes. Where applicable, reference to such statutes may be helpful in attempting to define the responsibilities of such officers.

12. This is taken directly from § 941.26(4)(d), which refers to causing harm to "a person who the actor knows, or has reason to know, is a peace officer who is acting in an official capacity."

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1341D POSSESSION OF OLEORESIN OF CAPSICUM (PEPPER SPRAY)[1] OR CS GEL BY A CONVICTED FELON — § 941.26(4)(L)

Statutory Definition of the Crime

Section 941.26(4)(L) of the Criminal Code of Wisconsin is violated by a person who possesses a device or container of (oleoresin of capsicum)[2] (CS gel)[3] and has been convicted of a felony.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a device or container.

   "Possess" means that the defendant knowingly[4] had actual physical control of a device or container.[5]

2. The device or container contained (oleoresin of capsicum) (CS gel).[6]

3. The defendant had been convicted of a felony before (date of offense).[7]

   (Name of felony) is a felony in Wisconsin.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

This instruction was originally published as Wis JI-Criminal 1341B in 1995. It was revised and renumbered as Wis JI-Criminal 1341D in 2007. This revision was approved by the Committee in December 2019; it reflects changes made by 2019 Wisconsin Act 52.

This instruction is for an offense created by 1995 Wisconsin Act 25 [effective date: July 20, 1995]. Section 2 of 1995 Wisconsin Act 25 provides that it "first applies to the possession of a device or container on the effective date of this subsection, regardless of the date that the prior felony or crime, as described in section 941.26(4)(L) of the statutes, as created by this act, occurred." The statute does not apply if the person has received a pardon. § 941.26(4)(L).

The substance CS gel was added to the language of § 941.26 (4)(a) by 2019 Wisconsin Act 52 [effective date November 24, 2019].

Other offenses involving oleoresin of capsicum or CS gel are addressed in Wis JI-Criminal 1341B and 1341C.

1. The statute uses the term "oleoresin of capsicum" to refer to the substance commonly known as "pepper spray" or "pepper mace." It may help the understandability of the instruction if the common name is used, but the statutory term is used throughout this model. The full statutory description is "a device or container that contains a combination of oleoresin of capsicum or CS gel and inert ingredients but does not contain any other gas or substance that will cause bodily discomfort." § 941.26(4)(a)

2. See note 1, supra.

3. "'CS gel' means nonatomizing, gel-form chlorobenzalmalononitrile. § 941.26(1c)(a)."

4. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

5. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

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6. Because the offense definition does not use the word "intentionally," the Committee concluded that knowledge that the device or container contained oleoresin of capsicum or CS gel is not required. Compare footnote 8 in Wis JI-Criminal 1341B.

7. The date of the offense should be inserted in this blank.

8. See note 7, Wis JI-Criminal 1343 which discusses the application of a similar statute to felony convictions from other state, stipulating to the fact of the felony conviction, and similar issues.

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1343 POSSESSION OF A FIREARM — § 941.29(1m)

Statutory Definition of the Crime

Section 941.29(1m) of the Criminal Code of Wisconsin is violated by a person who possesses a firearm if that person has been convicted of a felony.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a firearm.

   "Firearm" means a weapon which acts by the force of gunpowder.[2] [It is not necessary that the firearm was loaded or capable of being fired.][3]

   "Possess" means that the defendant knowingly[4] had actual physical control of a firearm.[5]

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

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[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

2. The defendant had been convicted of a felony before (date of offense).[6]

[(Name of felony) is a felony in Wisconsin.][7]

[The parties have agreed that the defendant was convicted of a felony before (date of offense) and you must accept this as conclusively proved.][8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1343 was originally published in 1983 and revised in 1984, 1986, 1987, 1993, 1996, 1999, 2007, 2011, and 2016. This revision was approved by the Committee in October 2019; it added to the Comment.

Section 941.29 was revised by 2015 Wisconsin Act 109. The offense definition did not change but is now found in sub. (1m); the instruction was revised to reflect that change. In addition, Act 109 repealed former sub. (2) and created sub. (4m) to require a minimum sentence for cases involving persons with a prior record relating to a "violent felony" or a "violent misdemeanor." Those terms are defined in new sub. (1g). [The effective date of Act 109 is November 13, 2015; but § 941.29(4m)(b) states: "This subsection does not apply to sentences imposed after July 1, 2020."]

See Wis JI-Criminal 1343A for material to add to this instruction in cases where the narrow defense of privilege recognized in State v. Coleman, 206 Wis.2d 198, 556 N.W.2d 701 (1996), is raised.

See Wis JI-Criminal 1343B for violations of § 941.29(4), furnishing a firearm to a felon.

See Wis JI-Criminal 1344 for violations of § 941.29(1m)(f) and (g), possession of a firearm by a person subject to an injunction.

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The state has jurisdiction to enforce § 941.29 on tribal reservations. State v. Jacobs, 2007 WI App 155, 302 Wis.2d 675, 735 N.W.2d 535.

The right to bear arms amendment to the state constitution did not invalidate § 941.29. State v. Thomas, 2004 WI App 115, 274 Wis.2d 513, 683 N.W.2d 497. The statute is not unconstitutionally vague or over broad and it does not deny the equal protection of the laws. Id.

Section 2 of Chapter 141, Laws of 1981, related to the applicability of the law and was not printed in the statutes. It provided: "This act applies to persons regardless of the date the crime specified under § 941.29(1) of the statutes, as created by this act, is committed." However, for the statute to apply, the possession of the firearm would have had to occur after the statute's effective date, which was March 31, 1982.

Section 973.033, effective March 31, 1990, requires that whenever a defendant is sentenced for a felony, "the court shall inform the defendant of the requirements and penalties under s. 941.29." This does not add a requirement to a charge under § 941.29, that the required advice was given. State v. Phillips, 172 Wis.2d 391, 493 N.W.2d 238 (Ct. App. 1992). Phillips confirmed that the offense has two elements: being a convicted felon and possessing a firearm. 172 Wis.2d 391, 354.

In State v. Thiel, 188 Wis.2d 695, 524 N.W.2d 641 (1994), the court upheld the application of § 941.29 to a person whose felony conviction occurred in 1970, eleven years before § 941.29 was enacted. The court concluded that "the statute was not enacted with the intent to punish convicted felons and as such is not an ex post facto law as applied to [Thiel]." 188 Wis.2d 695, 697.

1. The instruction is drafted for cases involving possession of a firearm by a person convicted of a felony. However, the statute also applies to other categories of individuals. See § 941.29(1m)(a) through (g). This instruction is suitable for use in cases involving subs. (1m)(a) and (b). (See discussion in note 7.) For cases involving subs. (1m)(c) through (em), the instruction must be modified. [Subsection (1m)(em) was created by 2009 Wisconsin Act 258.] For cases involving subs. (1m)(f) and (g), see Wis JI-Criminal 1344.

The statement of the elements in the instruction is a substantial shortening of the full statutory definition. Note that there are exceptions to the coverage of the statute in subsections (5) through (9) of § 941.29.

The exception in subsection (5)(b) was added by 1985 Wisconsin Act 259. The cited provision, 18 U.S.C. § 925(c), allows the secretary of the treasury to grant relief from the disabilities relating to possession of firearms if the person's conviction did not involve a firearm offense and the secretary is satisfied "that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief will not be contrary to the public interest."

The Wisconsin Attorney General has concluded that subsec. (5)(a) has been invalidated by congressional action. Effective November 15, 1986, 18 U.S.C. app. § 1203, was repealed in favor of 18 U.S.C. § 921(a)(20). "Any pardon granted . . . since November 15, 1986, will give the recipient the right to . . . possess . . . firearms unless the pardon 'expressly provides that the person may not ship, transport, possess or receive firearms.' 18 U.S.C. § 921(a)(20)." OAG-6-89, Feb. 20, 1989.

2. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

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3. Possession of a disassembled and inoperable firearm is a violation of § 941.29. The "term 'firearm' is appropriately defined as a weapon that acts by force of gunpowder to fire a projectile irrespective of whether it is inoperable due to disassembly." State v. Rardon, 185 Wis.2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994), citing Wis JI-Criminal 1343 with approval. Also see State v. Johnson, 171 Wis.2d 175, 491 N.W.2d 110 (Ct. App. 1992), reaching a similar conclusion with respect to the definition of "shotgun" under § 941.28.

4. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

5. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another:

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

In State v. Black, 2001 WI 31, 242 Wis.2d 126, 624 N.W.2d 363, the court suggested that "handling" a firearm was sufficient to satisfy the "possession" element. The court concluded that a criminal complaint alleging that the defendant handled a firearm provided a sufficient factual basis to support a guilty plea to violating § 941.29.

6. The date of the offense should be inserted in this blank.

7. The statute applies to persons convicted of a felony in Wisconsin and also to persons convicted of crimes in other states that would be felonies in Wisconsin. In the Committee's judgment, the way the second element is phrased should be suitable for handling either alternative. Where the crime committed in another state has a name not used in Wisconsin, it may be helpful to add a sentence to the effect that the offense would have been a felony if committed in this state. The Committee concluded that the statutory elements of the crime of which the defendant was convicted in the other state should be compared with the statutory elements of the comparable Wisconsin offense. One must be able to say that those elements "would be a felony if committed in this state."

The Committee also concluded that the statute need not be interpreted to require that the defendant "know he was convicted of a felony" or know that he was prohibited from possessing a firearm. A person may fairly be held to know the nature of a crime of which he was convicted and to know the disabilities that may attend such a conviction.

Section 939.23(1) provides: "When criminal intent is an element of a crime in chs. 939 to 951, such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe.'" The Committee generally applies the converse of this rule: if a statute does not use one of the "intent words" – in this case it would most likely be "knowingly" – a mental state is not required.

[Compare § 941.29 with its federal counterpart, 18 USC 924(a)(2) which refers to one who "knowingly" violates the federal prohibition in 18 USC 922(g) on firearm possession. 18 USC 924(a)(2)

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was interpreted in Rehaif v. United States, 139 S.CT. 2191 [No. 17-9560, decided June 21, 2019] to require that the defendant knew he possessed a firearm and knew that he was an alien unlawfully in the country and thus prohibited from possessing a firearm under 18 USC 922(g). Because it is a decision interpreting a federal statute and is not constitutionally based, Rehaif has no direct application to § 941.29.]

Where the out-of-state conviction is under a statute that is broader than its Wisconsin counterpart, courts should evaluate whether the conduct that led to the conviction would be considered a felony if committed in Wisconsin. If it would, the out-of-state conviction can be the basis for the application of § 941.29. State v. Campbell, 2002 WI App 20, 250 Wis.2d 238, 642 N.W.2d 230.

Wisconsin law clearly distinguishes between a pardon and a restoration of rights. Under § 941.29(5)(a), a pardon – not merely a restoration of rights – remains necessary for a felon to be relieved of his or her firearms disabilities. Where the removal of a felon's political disabilities imposed as a result of an out-of-state conviction restores the felon's right to possess a firearm in that state, a pardon is still required for the felon to possess firearms in Wisconsin. Moran v. Wisconsin Department of Justice, 2019 WI App 38, 388 Wis.2d 193, 932 N.W.2d 430.

8. Defendants may offer to stipulate to the fact of their felon status. The bracketed statement in the instruction includes the standard statement on the effect of a stipulation found in Wis JI-Criminal 162, **AGREED FACTS**. The effect of a stipulation in a prosecution for violating § 941.29 has been described as follows:

> . . . where prior conviction of a felony is an element of the offense with which the defendant is charged and the defendant is willing to stipulate that he or she is a convicted felon, evidence of the nature of the felony is irrelevant if offered solely to establish the felony-conviction element of the offense. The trial court therefore abused its discretion in allowing the prosecutor to inform the jury as to the nature of McAllister's crime.

State v. McAllister, 153 Wis.2d 523, 525, 451 N.W.2d 764 (Ct. App. 1989).

The fact of felon status may still be revealed; it is the nature of the felony that is not to be disclosed. State v. Nicholson, 160 Wis.2d 803, 804, 467 N.W.2d 139 (Ct. App. 1991).

Care must be taken where a stipulation goes to an element of a crime. A waiver should be obtained. See Wis JI-Criminal 162A Law Note: Stipulations.

An example of a complete waiver inquiry is as follows:

TO THE DEFENDANT:

1. Do you understand that one of the elements of the crime of felon in possession of a firearm is that you have been convicted of a felony before the date of this offense?

2. Do you understand that you have the right to have a jury, that is, twelve people, decide whether or not the state has proved beyond a reasonable doubt that you have been convicted of a felony before the date of this offense?

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3. Do you understand that the State has to convince each member of the jury that you have been convicted of a felony before the date of this offense?

4. With this stipulation, you are agreeing that I tell the jury that you have been convicted of a felony before the date of this offense, and that they are to accept this fact as conclusively proved?

5. Has your attorney explained the pros and cons, that is, the advantages and disadvantages of entering into this agreement?

6. Have you had enough time to talk all of this over with your attorney?

7. Has anyone pressured you or threatened you in any way, or made any promises to you, to get you to enter into this agreement?

8. Are you entering into this agreement of your own free will?

9. Have you had enough time to make your decision?

TO DEFENSE COUNSEL:

1. Are you satisfied that your client thoroughly understand (his) (her) right to enter into this agreement regarding (his) (her) prior conviction or to not enter into this agreement?
2. Are you satisfied that your client is entering into this agreement freely, voluntarily, intelligently, and knowingly?

FINDING: The court is also satisfied that the defendant is entering into this agreement freely, voluntarily, intelligently, and knowingly. The court therefore accepts the stipulation.

Also see State v. Aldazabal, 146 Wis.2d 267, 430 N.W.2d 614 (Ct. App. 1988), where the defendant, charged with violating § 941.29, stipulated that he had been convicted of a felony. The stipulation was not formally admitted into evidence, but the court of appeals held that the mentioning of the stipulation during the prosecutor's opening statement was sufficient to support the conviction.

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1345 FIRST DEGREE RECKLESSLY ENDANGERING SAFETY — § 941.30(1)

Statutory Definition of the Crime

First degree recklessly endangering safety, as defined in § 941.30(1) of the Criminal Code of Wisconsin, is committed by one who recklessly endangers the safety of another human being under circumstances that show utter disregard for human life.

State's Burden of Proof

Before you may find the defendant guilty of first degree recklessly endangering safety, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant endangered the safety of another human being.

2. The defendant endangered the safety of another by criminally reckless conduct.

"Criminally reckless conduct" means:[1]

- the conduct created a risk of death or great bodily harm to another person; and

- the risk of death or great bodily harm was unreasonable and substantial; and

- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[2]

"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent

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or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.[3]

3. The circumstances of the defendant's conduct showed utter disregard[4] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all other facts and circumstances relating to the conduct.[5]

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[6]

[Consider also the defendant's conduct after the act alleged to have endangered safety to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the act alleged to have endangered safety occurred.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense were present, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1345 was originally published in 1962 and revised in 1989, 1993, 2002, 2003, 2009, 2012, and 2015. The 2012 revision added the material at footnote 6. The 2015 revision revised footnote 2 to reflect 2013 Wisconsin Act 307. The Comment was updated in April 2019. A "Reporter's Note" was removed in 2020.

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This instruction is for a violation of § 941.30(1), as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The amended statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

First degree recklessly endangering safety replaces what was called "endangering safety by conduct regardless of life" under prior law.

The homicide revision also created § 941.30(2), Second Degree Recklessly Endangering Safety. See Wis JI-Criminal 1347.

In State v. Kloss, 2019 WI App 13, 386 Wis.2d 314, 925 N.W.2d 563, the court of appeals held that solicitation of first-degree recklessly endangering safety is a crime and that it is a lesser included offense of solicitation of first-degree reckless injury. Therefore convicting the defendant of both offenses was multiplicitous.

1. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

2. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

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Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

3. See § 939.22(14) and Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

4. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. However, if voluntary intoxication prevents the actor from being aware of the risk, such intoxication is not a defense. Section 939.24(3) provides:

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.
>
> Note to § 939.24(3), 1987 Senate Bill 191.

In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

5. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life":

> First-degree reckless homicide is analogous to the prior offense of 2nd-degree murder. The concept of "conduct evincing a depraved mind, regardless of human life" has been a difficult one for modern juries to comprehend. To avoid the mistaken connotation that a clinical mental disorder is involved, the offense has been recodified as aggravated reckless homicide. The revision clarifies that a subjective mental state, i.e., criminal recklessness,

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is required for liability. See s. 939.24, stats. The aggravating element, i.e., circumstances which show utter disregard for human life, is intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of human life." State v. Dolan, 44 Wis.2d 68, 170 N.W.2d 822 (1969); State v. Weso, 60 Wis.2d 404, 210 N.W.2d 442 (1973).

Note to § 940.02, 1987 Senate Bill 191.

The Dolan and Weso cases do not contain significant definitions themselves but rather cite with approval Wis JI-Criminal 1345 (© 1962), which used the phrase "utter lack of concern for the life and safety of another."

The Committee concluded that no further definition of the phrase "utter disregard" was necessary. The jury should be able to give the phrase a common sense meaning in determining whether the conduct is such that it amounts to aggravated reckless homicide offense.

A phrase with essentially the same meaning is used in the Model Penal Code. Section 2.02(1)(b) provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Commentary to § 2.02(1)(b) explains that whether conduct demonstrates "extreme indifference" "is not a question . . . that can be further clarified." Attempts to explain the term by reference to common law concepts, says the Commentary, suffer from lack of clarity, and "extreme indifference" is simpler and more direct than other attempts to reformulate the common law.

The Judicial Council Committee considered the Model Penal Code formulation but opted for "utter disregard," apparently on the grounds that it would more clearly tie in with prior case law which could be referred to for examples of the kind of conduct that is intended to be covered by first degree reckless homicide under the revised statutes.

For discussions of "conduct evincing a depraved mind, regardless of human life" under prior law, see, e.g., Balistreri v. State, 83 Wis.2d 440, 265 N.W.2d 290 (1978); Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977); and, Seidler v. State, 64 Wis.2d 456, 219 N.W.2d 320 (1974). In State v. Geske, 2012 WI App 15, 339 Wis.2d 170, 810 N.W.2d 226, the defendant, convicted of first degree reckless homicide, challenged the sufficiency of the evidence on the "utter disregard" element. Relying on the Wagner and Balistreri cases, she argued that her swerve just before the collision showed some regard for human life. The court held that the evidence of the swerve had to be considered in the context of all the circumstances: "A legally intoxicated person driving over eighty miles per hour through the city could not reasonably expect to avoid any collision by swerving at the last moment. Given the totality of the situation here, Geske's ineffectual swerve failed to demonstrate a regard for human life." ¶18.

The meaning of "utter disregard for human life" was discussed in State v. Jensen, 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170. The court relied on Weso, supra, to conclude that the phrase identifies an objective standard. The court noted:

> Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such, need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind-by the defendant's statements, for example, before, during and after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the

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victim, for example, or evidence of a particularly obvious, potentially lethal danger. However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. ¶17.

The Committee considered changing the instruction in response to Jensen, but concluded that the text accurately conveys a standard consistent with the decision. Jensen concluded that the standard could be understood and applied "without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges." ¶29. The Committee concluded that the instruction could also be properly applied without attempting to articulate "categorical rules."

Also see, State v. Edmunds, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), which, like Jensen, reviewed the application of the "utter disregard . . ." standard to a "shaken baby" case.

All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. These circumstances would include facts relating to the possible provocation of the defendant:

> Under prior law, adequate provocation mitigated 2nd-degree murder to manslaughter. State v. Hoyt, 21 Wis.2d 284, 124 N.W.2d 47 (1965). Under this revision, the analogs of those crimes, i.e., first-degree reckless and 2nd-degree intentional homicide, carry the same penalty; thus mitigation is impossible. Evidence of provocation will usually be admissible in prosecutions for crimes requiring criminal recklessness, however, as relevant to the reasonableness of the risk (and, in prosecutions under this section, whether the circumstances show utter disregard for human life). Since provocation is integrated into the calculus of recklessness, it is not an affirmative defense thereto and the burdens of production and persuasion stated in s. 940.01(3), stats., are inapplicable.
>
> Judicial Council Note to § 940.02, 1987 Senate Bill 191.

6. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. The decision reversed a decision of the court of appeals which had reversed Burris' conviction for 1st degree reckless injury. The court of appeals reversed because the trial court's response to a jury question about whether after-the-incident conduct should be considered in evaluating whether "the circumstances show utter disregard for human life" was potentially misleading. The supreme court held:

> ¶7 We conclude that, in an utter disregard analysis, a defendant's conduct is not, as a matter of law, assigned more or less weight whether the conduct occurred before, during, or after the crime. We hold that, when evaluating whether a defendant acted with utter disregard for human life, a fact-finder should consider any relevant evidence in regard to the totality of the circumstances.

The court also held, that under the facts of the Burris case, "the supplemental instruction did not mislead the jury into believing that it could not consider Burris's relevant after-the-fact conduct in its determination on utter disregard for human life." ¶8.

The court recommended that the Committee address this issue in the jury instructions:

> ¶64 . . . [S]upplemental instructions such as the one given here, taken out of context from Jensen, do have the potential to be confusing. Thus, we recommend that the Criminal Jury Instruction Committee, in its comments to the "first-degree reckless" offense instructions, Wis JI-Criminal 1016-22, 1250, and the utter disregard for human life instruction, Wis

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JI-Criminal 924A, advise against taking certain language directly from utter disregard cases such as Jensen without providing the necessary context to fully explain the proper inquiry. Additionally, we recommend that the Committee consider revising these instructions to more explicitly direct the jury that, in its utter disregard for human life consideration, it should consider the totality of the circumstances including any relevant evidence regarding a defendant's conduct before, during, and after the crime.

The addition to the instruction referring to after-the-fact conduct is intended to address the court's suggestions. The committee decided it was not necessary to include a reference to conduct before or during the act because the paragraph immediately preceding the addition calls the jury's attention to "what the defendant was doing" and "all the other facts and circumstances relating to the conduct." Juries will rarely have questions about the relevance of conduct before and during the act but they may have questions about the after-fact-conduct, as the jury in the Burris case did.

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1392 INVASION OF PRIVACY: USE OF A SURVEILLANCE DEVICE — § 942.08(2)(a)

Statutory Definition of the Crime

Invasion of privacy, as defined in § 942.08(2)(a) of the Criminal Code of Wisconsin, is committed by one who knowingly installs a surveillance device in any private place, or uses a surveillance device to observe in a private place, with the intent to observe any nude or partially nude person without the consent of that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements are present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly (installed a surveillance device in a private place) (used a surveillance device to observe in a private place).[1]
2. The defendant intended to use the surveillance device to observe any nude or partially nude person.
3. The defendant intended to observe a nude or partially nude person without the consent of that person.

Meaning of "Surveillance Device"

"Surveillance device" means any device that can be used to observe activities of another person. [It includes a peephole.][2]

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Meaning of "Private Place"

"Private place" means a place where a person may reasonably expect to be safe from being observed without his or her knowledge and consent.[3]

Meaning of "Nude or Partially Nude Person"

"Nude or partially nude person" means [any human being who has less than fully and opaquely covered genitals, pubic area or buttocks] [any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple] [any male human being with covered genitals in a discernibly turgid state].[4]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS I FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE.[5]

If you find the defendant guilty, you must answer the following question:

Was (name of victim) under the age of 18 years at the time of the offense?

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Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1392 was originally published in 2007 and revised in October 2016 to reflect changes made to § 942.08 by 2015 Wisconsin Acts 292 and 320. This revision was approved by the Committee in February 2020; it added to the comment.

This instruction is for a violation of sub. (2)(a) of §942.08. Three additional offenses are defined in subs. (2)(b), (c), and (d). See Wis JI-Criminal 1395 for violations of sub. (2)(d); uniform instructions have not been drafted for the other two offenses.

1. 2019 Wisconsin Act 72 [effective date: January 23, 2020] created a narrow exception in regard to the installation of a surveillance device by an owner of real estate in connection with the sale of the real estate. See § 995.60(2). This exception does not apply to surveillance devices installed in bathrooms or washrooms. § 995.60(3).

2. This is a simplification of the definition provided in s. 942.08(1)(c). The Committee concluded that referring to "device" covered the other terms used in the statutory definition: "instrument, apparatus, implement, mechanism or contrivance." While referring to a device that "can be used" is arguably broader than the statute's "used, designed to be used to observe, or capable of observing," any potential problem is cured by the second element of the offense, which requires that the defendant intended to use the device to observe a nude or partially nude person.

3. This is the definition provided in s. 942.08(1)(b).

4. This is the definition provided in s. 942.08(1)(a), without change, except for bracketing separable parts of the definition. The applicable bracketed definition should be selected.

5. 2015 Wisconsin Act 320 [effective date: April 1, 2016] changed the penalty structure for violations of sec. 942.08: the offense is a Class I felony if the victim had not attained the age of 18 years at the time of the offense. See § 942.08(4). The instruction reflects this change by providing a special question to be used where the Class I felony is charged. If the Class I felony is not charged, the instruction should be used without the special question.

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1398A PUBLISHING A PRIVATE REPRESENTATION DEPICTING NUDITY WITHOUT CONSENT — § 942.09(3m)(a)1.

Statutory Definition of the Crime

Section 942.09(3m)(a)1. of the Criminal Code of Wisconsin is violated by a person who posts, publishes, or causes to be posted or published, a private representation if the actor knows that the person depicted does not consent to the posting or publication of the private representation.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [(posted) (published)][1] [(caused to be (posted) (published)] a private representation.
2. The defendant knew that the person who is depicted did not consent to the (posting) (publication) of the private representation.

Meaning of "Representation"

"Representation" means a photograph, exposed film, motion picture, videotape, recording, other visual or audio representation, or data that represents a visual image or audio recording.[2]

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Meaning of "Did Not Consent"

"Did not consent" means that (name) did not freely agree to the (posting) (publishing) of the private representation.[3]

Meaning of "Private Representation"

"Private representation" means a representation depicting a nude or partially nude person or depicting a person engaging in sexually explicit conduct that is intended by the person depicted in the representation to be captured, viewed, or possessed only by the person who, with the consent of the person depicted, captured the representation or to whom the person depicted directly and intentionally gave possession of the representation.[4]

Meaning of "Nude or Partially Nude Person"

"Nude or partially nude person" means [any human being who has less than fully and opaquely covered genitals, pubic area or buttocks] [any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple] [any male human being with covered genitals in a discernibly turgid state].[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS I FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE.[6]

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If you find the defendant guilty, you must answer the following question:

Was (name of victim) under the age of 18 years at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1398A was originally published in 2015 and revised in 2017 and 2018. The 2017 revision reflected changes made to § 942.09 by 2015 Wisconsin Acts 292, 320, and 370. The 2018 revision made an editorial correction in the definition of "representation." This revision was approved by the Committee in 2019; it added to the Comment to reflect changes made by 2019 Wisconsin Act 16.

This instruction is for a violation of sub. (3m)(a)1. of § 942.09 as created by 2013 Wisconsin Act 243 [effective date: April 10, 2014].

A second, very similar offense is defined in § 942.09(3m)(a)2. that applies to one who: "posts, publishes, or causes to be posted or published, a depiction of a person that he or she knows is a private representation, without the consent of the person depicted." See Wis JI-Criminal 1398B.

Exceptions to the applicability of sub. (3m) are set forth in sub. (3m)(b)1. through 4. Subdivision 1 was amended by 2015 Wisconsin Act 370 [effective date: April 21, 2016] The instruction does not address the exceptions.

1. Section 942.09(1)(bg) states: "'Post or publish' includes posting or publishing on a Web site on the Internet, if the Web site may be viewed by the general public."

2. This is the definition provided in § 942.09(1)(c).

3. § 942.09(1)(ae) defines "consent":

> . . . words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to the act. A person who has not attained the age of 18 is incapable of consent. The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11(2):
>
> 1. A person suffering from a mental illness or defect that impairs capacity to appraise personal conduct.
> 2. A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

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The statutory definition is modeled on the one provided in § 940.225(4) for sexual assault. The instruction defines "did not consent" in essentially the same manner as the instructions for sexual assault under § 940.225 define "without consent." A complete explanation of that definition is provided in, for example, footnote 2, Wis JI-Criminal 1201. Also see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for the victim's not being competent to give informed consent, suffering from a mental illness or defect, or being unconscious.

4. This is the definition provided in § 942.09(1)(bn).

If a definition of "sexually explicit conduct" is believed to be necessary, § 942.09(1)(d) provides that the definition of the term in § 948.01(7) applies:

"Sexually explicit conduct" means actual or simulated:

(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts. See Wis. Stat. 948.01(1t) for definition of this term.

5. This is the definition provided in § 942.08(1)(a), which applies to this offense because of a cross-reference in § 942.09(1)(am).

6. 2015 Wisconsin Act 320 [effective date: April 1, 2016] changed the penalty structure for violations of sec. 942.09: the offense is a Class I felony if the victim had not attained the age of 18 years at the time of the offense. See § 942.09(3m)(am). The instruction reflects this change by providing a special question to be used where the Class I felony is charged. If the Class I felony is not charged, the instruction should be used without the special question.

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1398B PUBLISHING A DEPICTION THAT IS KNOWN TO BE A PRIVATE REPRESENTATION OF NUDITY WITHOUT CONSENT— § 942.09(3m)(a)2.

Statutory Definition of the Crime

Section 942.09(3m)(a)2. of the Criminal Code of Wisconsin is violated by a person who posts, publishes, or causes to be posted or published, a depiction of a person that he or she knows is a private representation without the consent the person depicted.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [(posted) (published)][1] [(caused to be (posted) (published)] a depiction of a person.
2. The defendant knew that the depiction was a private representation.
3. The person who is depicted did not consent to the (posting) (publication) of the private representation.

Meaning of "Representation"

"Representation" means a photograph, exposed film, motion picture, videotape, recording, other visual or audio representation, or data that represents a visual image or audio recording.[2]

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Meaning of "Did Not Consent"

"Did not consent" means that (name) did not freely agree to the (posting) (publishing) of the private representation.[3]

Meaning of "Private Representation"

"Private representation" means a representation depicting a nude or partially nude person or depicting a person engaging in sexually explicit conduct that is intended by the person depicted in the representation to be captured, viewed, or possessed only by the person who, with the consent of the person depicted, captured the representation or to whom the person depicted directly and intentionally gave possession of the representation.[4]

Meaning of "Nude or Partially Nude Person"

"Nude or partially nude person" means [any human being who has less than fully and opaquely covered genitals, pubic area or buttocks] [any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple] [any male human being with covered genitals in a discernibly turgid state].[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS I FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD

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NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE.[6]

If you find the defendant guilty, you must answer the following question:

Was (name of victim) under the age of 18 years at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1398B was originally published in 2015 and revised in 2017, 2018, and 2019. The 2017 revision reflected changes made to § 942.09 by 2015 Wisconsin Acts 292, 320, and 370. The 2018 revision made an editorial correction in the definition of "representation." This revision was approved by the Committee in 2019; it added to the Comment to reflect changes made by 2019 Wisconsin Act 16.

This instruction is for a violation of sub. (3m)(a)2. of § 942.09 as created by 2013 Wisconsin Act 243 [effective date: April 10, 2014].

A second, very similar offense is defined in § 942.09(3m)(a)1. that applies to one who: "posts, publishes, or causes to be posted or published, a private representation if the actor knows that the person depicted did not consent to the posting or publication . . ." See Wis JI-Criminal 1398A.

In State v. Culver, 2018 WI App 55, 384 Wis.2d 222, 918 N.W.2d 103, the Wisconsin Court of Appeals held that § 942.09(3m)(a)2. was not overbroad in violation of the First Amendment and was unconstitutionally vague.

Exceptions to the applicability of sub. (3m) are set forth in sub. (3m)(b)1. through 4. Subdivision 1 was amended by 2015 Wisconsin Act 370 [effective date: April 21, 2016] The instruction does not address the exceptions.

1. Section 942.09(1)(bg) states: "'Post or publish' includes posting or publishing on a Web site on the Internet, if the Web site may be viewed by the general public."

2. This is the definition provided in § 942.09(1)(c).

3. § 942.09(1)(ae) defines "consent":

. . . words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to the act. A person who has not attained the age of 18 is incapable of

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consent. The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11(2):

1. A person suffering from a mental illness or defect that impairs capacity to appraise personal conduct.
2. A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The statutory definition is modeled on the one provided in § 940.225(4) for sexual assault. The instruction defines "did not consent" in essentially the same manner as the instructions for sexual assault under § 940.225 define "without consent." A complete explanation of that definition is provided in, for example, footnote 2, Wis JI-Criminal 1201. Also see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for the victim's not being competent to give informed consent, suffering from a mental illness or defect, or being unconscious.

4. This is the definition provided in § 942.09(1)(bn).

If a definition of "sexually explicit conduct" is believed to be necessary, § 942.09(1)(d) provides that the definition of the term in § 948.01(7) applies:

"Sexually explicit conduct" means actual or simulated:

(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts. See Wis. Stat. 948.01(1t) for definition of this term.

5. This is the definition provided in § 942.08(1)(a), which applies to this offense because of a cross-reference in § 942.09(1)(am).

6. 2015 Wisconsin Act 320 [effective date: April 1, 2016] changed the penalty structure for violations of sec. 942.09: the offense is a Class I felony if the victim had not attained the age of 18 years at the time of the offense. See § 942.09(3m)(am). The instruction reflects this change by providing a special question to be used where the Class I felony is charged. If the Class I felony is not charged, the instruction should be used without the special question.

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1400 CRIMINAL DAMAGE TO PROPERTY — § 943.01

Statutory Definition of the Crime

Criminal damage to property, as defined in § 943.01 of the Criminal Code of Wisconsin, is committed by one who intentionally causes damage to the physical property of another person without the consent of that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused damage to physical property.

   The word "damage" includes anything from mere defacement to total destruction.[1]

2. The defendant intentionally caused the damage.

   The term "intentionally" means that the defendant must have had the mental purpose to damage the property or was aware that the conduct was practically certain to cause that result.[2]

3. The property belonged to (name of owner, agent, etc.).[3]

4. The defendant caused the damage without the consent[4] of (name of owner, agent, etc.).

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5. The defendant knew the property belonged to another and knew that the property owner did not consent to the damage.[5]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE FELONY OFFENSE IS CHARGED, AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE PROPERTY WAS REDUCED IN VALUE BY MORE THAN $2,500.[6]

[Finding the Reduction in the Value of the Property]

[If you find the defendant guilty, answer the following question:

"Was the property reduced in value by more than $2,500?"

Answer: "yes" or "no."

"Reduced in value" means what it would cost to repair or replace the property, whichever is less.[7] Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the property was reduced in value by more than $2,500.]

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ADD THE FOLLOWING FOR FELONY CASES INVOLVING DAMAGE TO MORE THAN ONE ITEM OF PROPERTY "PURSUANT TO A SINGLE INTENT AND DESIGN," AS PROVIDED IN § 943.01(3).[8]

[In determining the amount by which the value of the property was reduced, you may consider all damage that you are satisfied beyond a reasonable doubt was caused by acts of the defendant pursuant to a single intent and design.]

COMMENT

Wis JI-Criminal 1400 was originally published in 1976 and revised in 1977, 1987, 1995, 1999, and 2002. This revision was approved by the Committee in February 2020; it added to the comment.

This instruction is for violations of § 943.01. The basic offense is a Class A misdemeanor. The penalty increases to a Class H felony under circumstances specified in sub. (2k). The penalty increases to a Class I felony in six situations specified in sub. (2), one of which is addressed by this instruction: where the amount of property damage exceeds $2,500. This amount was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001.

The offense is a Class I felony if the property damaged is a coin or card operated machine damaged in the course of a theft. See Wis JI-Criminal 1400A.

The offense is a Class H felony if the property damaged is owned, leased, or operated by an energy provider [sub. (2k)]. See Wis JI-Criminal 1400B.

"Energy" provider means any of the following:

1. A public utility under s. 196.01 (5) (a) that is engaged in any of the following: (a) The production, transmission, delivery, or furnishing of heat, power, light, or water. (b)The transmission or delivery of natural gas.
2. A transmission company under s. 196.485 (1) (ge).
3. A cooperative association organized under ch. 185 for the purpose of producing or furnishing heat, light, power or water for its members.
4. A wholesale merchant plant under s. 196.491 (1) (w), except that "wholesale merchant plant" includes an electric generating facility or an improvement to an electric generating facility that is subject to a leased generation contract, as defined in s.196.52 (9) (a) 3.
5. A decommissioned nuclear power plant.
6. A company that operates a gas, oil, petroleum, refined petroleum product, renewable fuel, water, or chemical generation, storage transportation, or delivery system that is not a service station, garage, or other place where gasoline or diesel fuel is sold at retailer offered for sale at retail.

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The court should inquire whether the parties agree that the entity whose property is at issue is a qualified energy provider. If there is no agreement, the court should require the state designate under which subsection they are proceeding.

The offense is also a Class I felony where the property damaged:

- is a vehicle or highway and the damage is of a kind which is likely to cause injury to a person or further property damage [sub. (2)(a)2.]

- belongs to a public utility or common carrier and the damage is of a kind which is likely to impair the services of the public utility or common carrier [sub. (2)(c)]

- belongs to a person who is or was a grand or petit juror and the damage was caused by reason of any verdict or indictment assented to by the owner [sub. (2)(c)]

- is on state-owned land and is listed on the registry under sub. (5) [sub. (2)(e)]

- is a rock art site listed on the national register of historic places in Wisconsin [sub. (2)(f)2.]

- plant material used in research [sub. (2d), as created by 2001 Wisconsin Act 16; effective date: September 1, 2001]

If one of the above is alleged, the Committee recommends handling it with a special question, in the same manner that the value question is handled in this instruction.

"Common carrier" is defined in § 194.01. Also see Brockway v. Travelers Ins. Co., 107 Wis.2d 636, 638, 321 N.W.2d 332 (Ct. App. 1982): "Two elements characterize a carrier as a common carrier: (1) The service is for hire, and (2) the carrier holds itself out to the public."

There are other statutes which provide special criminal damage to property provisions for certain situations:

- § 943.01(2k) Criminal damage to property: energy provider property. See Wis JI-Criminal 1400B.

- § 943.011 Criminal damage or threat to property of witness. See Wis JI-Criminal 1400C.

- § 943.012 Criminal damage to religious and other property. See Wis JI-Criminal 1401.

- § 943.013 Criminal damage; threat; property of judge. See Wis JI-Criminal 1402A.

- § 943.015 Criminal damage; threat; property of department of revenue employee. See Wis JI-Criminal 1402B.

1. See Vol. V 1953 Judiciary Report on the Criminal Code, Wisconsin Legislative Council, page 97 (February 1953).

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2. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923.1.

3. Section 939.22(28) provides the following definition of "property of another": "'Property of another' means property in which a person other than the defendant has a legal or equitable interest which the defendant has no right to defeat or impair, even though the defendant may also have a legal or equitable interest in the property."

In State v. Sevelin, 204 Wis.2d 127, 131, 554 N.W.2d 521 (Ct. App. 1996), the court held that § 939.22(48) "unambiguously means that a person can be convicted of criminal damage to property even though he or she has an ownership interest if someone else also has an ownership interest." Thus, the defendant's conviction was affirmed where the charge was based on his damaging his own marital home, because his wife also had an ownership interest in the home.

4. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

5. See § 939.23(3).

6. A misdemeanor charge requires no finding as to reduction in value. This instruction and the verdict question need be given only if a felony is charged and the evidence would support a finding of damage exceeding $2,500. The value level was increased to $2,500 by 2001 Wisconsin Act 2001, effective date: September 1, 2001.

7. § 943.01(2)(d).

8. This material deals with the issue addressed by § 943.01(3) which provides:

> Where more than one item of property is damaged under a single intent and design, the damage to all the property may be prosecuted as a single forfeiture offense or crime.

The Committee's research on the issue of whether this need be submitted to the jury can be summarized as follows: (1) there is no case law dealing with subsec. (3) of the criminal damage to property statute; (2) § 943.01(3) was modeled after the provision applicable to theft cases, now found at § 971.36; (3) an instructive case, State v. Spraggin, dealt with a similar situation in the context of receiving stolen property; and (4) while there may be equally effective ways of dealing with the issue, the Committee concluded that the question of whether all property was damaged pursuant to a single intent and design must be submitted to the jury.

No reported appellate opinion could be found that dealt with the multiple items of property issue. Subsection (3) of § 943.01 was not part of the criminal damage to property statute included in the 1953 draft of the Criminal Code. It was added during the 1954-55 review by the advisory committee and was modeled after the statute then in effect and applicable to theft cases. That statute (formerly § 355.31) now appears, virtually without change, as § 971.36. No cases were found that discuss § 971.36 or its predecessor.

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State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 943.01(3) or § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25-inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (71 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal. App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis. 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616-17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple item decision for the value question alone. The instruction can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any property," the jury should find the defendant guilty. Then, in determining value, the jury should include damage to "all property which you find, beyond a reasonable doubt, to have been damaged pursuant to a single intent or design."

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1400B CRIMINAL DAMAGE TO PROPERTY: ENERGY PROVIDER PROPERTY — § 943.01(2k)

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER WIS JI-CRIMINAL 1400, CRIMINAL DAMAGE TO PROPERTY. [1]

Determining Damage to Energy Provider Property

If you find the defendant guilty, you must answer the following question:

"Did the defendant commit the crime of criminal damage to property under all of the following circumstances:

1) the property damaged was owned, leased, or operated by an energy provider; and,

2) the defendant intended to or did cause substantial interruption or impairment of any service or good provided by the energy provider."

[A decommissioned nuclear power plant is an energy provider.][2]

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of criminal damage to property under all these circumstances, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1400B was approved by the Committee in February 2019.

This instruction addresses subsection (2k) of § 943.01, created by 2015 Wisconsin Act 158. [Effective date: March 2, 2016]. Committing criminal damage to property under the circumstances specified in subsection (2k) increases the penalty to a Class H felony. As with similar provisions, the Committee recommends submitting this issue as a special question, to be considered by the jury if it reaches a guilty verdict on the criminal damage to property charge. The instruction assumes a case

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involving conduct which falls into the special niche created by § 943.01(2k): damage to energy provider property. See note 1, below.

The following form is suggested for the guilty verdict:

We, the jury, find the defendant guilty of criminal damage to property, under Wis. Stat. § 943.01, at the time and place charged in the information.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant commit the crime of criminal damage to property under all of the following circumstances:

1) the property damaged was owned, leased, or operated by an energy provider; and,

2) the defendant intended to or did cause substantial interruption or impairment of any service or good provided by the energy provider.

1. This instruction should be given after the basic instruction on criminal damage to property, Wis JI-Criminal 1400, in place of the value question that is provided at the end of that instruction. This assumes that the case is charged as one falling into the special niche created by § 943.01(2k): damage to energy provider property. Damage to energy provider property that exceeded $2,500 could, of course, be charged under the regular penalty provisions and would be a Class D felony. In that case, the value question at the end of Wis JI-Criminal 1400 should be used.

2. "Specify the applicable category of energy provider." Section 943.143(1)(a) provides:

"Energy provider" means any of the following:

1. A public utility under s. 196.01 (5) (a) that is engaged in any of the following: (a) The production, transmission, delivery, or furnishing of heat, power, light, or water. (b) The transmission or delivery of natural gas.
2. A transmission company under s. 196.485 (1) (ge).
3. A cooperative association organized under ch. 185 for the purpose of producing or furnishing heat, light, power or water for its members.
4. A wholesale merchant plant under s. 196.491 (1) (w), except that "wholesale merchant plant" includes an electric generating facility or an improvement to an electric generating facility that is subject to a leased generation contract, as defined in s.196.52 (9) (a) 3.
5. A decommissioned nuclear power plant.
6. A company that operates a gas, oil, petroleum, refined petroleum product, renewable fuel, water, or chemical generation, storage transportation, or delivery system that is not a service station, garage, or other place where gasoline or diesel fuel is sold at retail or offered for sale at retail.

The court should inquire whether the parties agree that the entity whose property is at issue is a qualified energy provider. If there is no agreement, the court should require that the state designate under which subsection they are proceeding.

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1400C DAMAGE OR THREAT TO PROPERTY OF A WITNESS — § 943.011

Statutory Definition of the Crime

Section 943.011 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) damage to any physical property owned by a person who is or was a witness by reason of the owner having attended or testified as a witness and without the owner's consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) damage to physical property that belonged to (name of victim).

   The word "damage" includes anything from mere defacement to total destruction.[1]

   IF THE CASE INVOLVES CAUSING DAMAGE, ADD THE FOLLOWING:

   ["Cause" means that the defendant's conduct was a substantial factor in producing damage.][2]

   IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

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[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][3]

2. (Name of victim) was a witness.

["Witness" means any person who has attended a proceeding to testify or who has testified.][4]

[A [insert proper term from the definition in § 940.41(3)] is a witness.]

3. The defendant (caused) (threatened to cause) damage to physical property owned by (name of victim) because[5] the person attended or testified as a witness.

4. The defendant (caused) (threatened to cause) damage to the property without the consent[6] of (name of victim).

5. The defendant acted intentionally. This requires that the defendant acted with the mental purpose[7] to (cause) (threaten to cause) damage to property owned by (name of victim) and knew that (name of victim) did not consent.[8]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and

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statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1400C was originally published in 1998 and revised in 2004. The 2004 revision involved adoption of a new format, adding a definition of "true threat," and nonsubstantive changes in the text. The instruction was previously designated as Wis JI-Criminal 1400B and was renumbered JI 1400C in 2020. This revision was approved by the Committee in February 2020; it renumbered and republished the instruction without change.

This instruction is for violations of § 943.011(2)(a), which was created by 1997 Wisconsin Act 143, effective date: May 5, 1998. Causing criminal damage to the property of a witness was formerly addressed by increasing the penalty for violations of § 943.01, Criminal Damage To Property. Act 143 deleted reference to witnesses from § 943.01 and expanded the scope of the statute by including threats to damage property and, in sub. (2)(b), threats to cause and causing of damage to property owned by family members of a witness. If damage to the property of a family member of a witness is involved, the instruction must be modified.

1. The definition of "damage" is the one provided in Wis JI-Criminal 1400, Criminal Damage To Property. See Vol. V 1953 Judiciary Report on the Criminal Code, Wisconsin Legislative Council, page 97 (February 1953).

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of damage. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also, see Wis JI-Criminal 901, Cause.

3. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court

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stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

4. The definition of "witness" in the first set of brackets is a simplified version of the definition provided in § 940.41(3), which applies to violations of § 943.011. If that statement does not fit the status of the victim, the definition in the second set of brackets should be used, selecting the proper alternative from the full definition, which reads as follows:

> (3) "Witness" means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who provided information concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under § 885.01 or under the authority of any court of this state or of the United States.

5. The instruction uses "because" in place of the statutory language "by reason of . . ." The Committee intended no substantive change and believed the instruction will be easier for a jury to understand if "because" is used.

6. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

7. For further definition of "intentionally," including the alternative referring to being "aware that his or her conduct is practically certain to cause the result," see Wis JI-Criminal 923A and 923B.

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8. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally."

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1421 BURGLARY WITH INTENT TO STEAL[1] — § 943.10(1)

Statutory Definition of the Crime

Burglary, as defined in § 943.10 of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building[2] without the consent of the person in lawful possession and with intent to steal.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally entered[3] a building.[3]
2. The defendant entered the building without the consent[4] of the person in lawful possession.[5]
3. The defendant knew that the entry was without consent.[6]
4. The defendant entered the building with intent to steal.[7]

"Intent to steal" requires that the defendant had the mental purpose to take and carry away[8] movable property of another without consent and that the defendant intended to deprive the owner permanently of possession of the property.[9] [It requires that the defendant knew the property belonged to another and knew the person did not consent to the taking of the property.][10]

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When Must Intent Exist?

The intent to steal must be formed before entry is made. The intent to steal, which is an essential element of burglary, is no more or less than the mental purpose to steal formed at any time before the entry, which continued to exist at the time of the entry.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[11]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF ONE OF THE AGGRAVATING FACTORS SET FORTH IN § 943.10(2) IS CHARGED AND SUPPORTED BY THE EVIDENCE, ADD WIS JI-CRIMINAL 1425A, 1425B, OR 1425C.[12]

COMMENT

Wis JI-Criminal 421 was originally published in 1966 and revised in 1984, 1991, 1993, 1996 and 2001. The 2001 revision involved adoption of a new format and nonsubstantive changes to the text. This revision was approved by the Committee in July 2019. It added to footnote 2 of the comment.

Criminal trespass to dwelling under § 943.14 is not a lesser included offense of burglary with intent to steal. Raymond v. State, 55 Wis.2d 482, 198 N.W.2d 351 (1972).

1. This instruction is drafted for burglary with the "intent to steal." If "intent to commit a felony" is charged, see Wis JI-Criminal 1424. For burglary offenses committed "while armed" or under other aggravating circumstances as prohibited by § 943.10(2), see Wis JI-Criminal 1425A, 1425B, and 1425C.

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2. The model instruction is drafted for a case involving entry into a "building." It must be modified if entry involved any of the other places listed in § 943.10(1)(a) through (f): any building or dwelling; an enclosed railroad car; an enclosed portion of any ship or vessel; a locked enclosed cargo portion of a truck or trailer; a motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or a room in any of the above.

The instruction has never included a definition of "building." The meaning of the term has been considered to be the same for burglary and arson cases. In an arson case, State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991), the Wisconsin Supreme Court held it was error for the trial court to state that "a mobile home is a building." The court said this created a "mandatory conclusive presumption . . . regarding an element of the arson offense." However, the court further held that the error was harmless because it played no role in the jury's verdict:

> We conclude that no rational juror could plausibly find that the structure in question was a mobile home without also finding that the structure was a building. . . . If the jury found this structure to be a mobile home, as that term is commonly understood, this finding would be the 'functional equivalent' of finding that the structure was a building.

160 Wis.2d 722, 740.

In United States of America v. Franklin, 2019 WI 64, 387 Wis.2d 259, 272, 928 N.W.2d 545, the Wisconsin Supreme Court concluded that the locational alternatives provided in Wis. Stat. § 943.01(1m)(a)-(f) are alternative factual means of committing one element of burglary. Providing context to this holding, the court referenced an example previously incorporated in State v. Pinder, 2018 WI 106, ¶60, 384 Wis. 2d 416, 919 N.W.2d 568. Although the issue in Pinder concerned the validity of a search warrant issued for the placement and use of a GPS tracking device on a motor vehicle, the court did make a ruling in which it denied an ineffective assistance of counsel claim for failure to object to the burglary jury instruction Wis. JI-Criminal 1421. Addressing this claim, the court emphasized the latitude afforded in the crafting of a burglary jury instruction so as to comport with the evidence of the case, noting that:

> "[w]hile the circuit court could have used the phrase 'a room within a building' instead of the words 'office' or 'building,' the facts adduced would not confuse the jury as to what it was called upon to decide regardless of which of these words might be used." Id. at 456.

The court in Franklin cited the analysis of the statutory text, the legislative history and context of the statute, along with the nature of the conduct, and the appropriateness of multiple punishments in its conclusion that Wis. Stat. § 943.01 "identifies alternative means of committing one element of the crime of burglary under § 943.01 (1m)(a)-(f)." Franklin at 273. Furthermore, the court found that the crime of burglary does not include a separate locational element, and jury unanimity on finding guilt beyond a reasonable doubt as to locational alternatives provided in § 943.01(1m)(a)-(f) is not necessary to convict. Id. 273.

If a definition of "building" is necessary, resort to a standard dictionary may be helpful. For example, Webster's Ninth New Collegiate Dictionary provides that a "building" refers to "a usually roofed and walled structure built for permanent use (as for a dwelling)."

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In Clark v. State, 69 Wis. 203, 33 N.W. 436 (1887), the issue was whether an unfinished house from which tools were taken was covered by § 4409 R.S. which made it a burglary to break "and enter in the night-time any office, shop, or any other building not adjoining or occupied with any dwelling house, or any ship, steamboat, vessel, railroad freight car or passenger car, with intent to commit the crime of larceny or other felony." The court held that the unfinished house was a "building" for purposes of burglary and defined the term as follows:

> . . . an edifice or structure erected upon land, and so far completed that it may be used temporarily or permanently for the occupation or shelter of man or beast, or for the storage of tools or other personal property for safe-keeping. . . . "The well-understood meaning of the word is a structure which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property."

69 Wis. 203, 206-07

A more recent case discusses "building" in connection with zoning rules prohibiting "mobile homes" but allowing "modular homes" and other buildings. The person's home had been mobile once, but at the site was affixed to a foundation and attached to utilities with steel undercarriage and trailer hitch removed. The court of appeals used the county's own definition of "building" and found that the home in question qualified:

> . . . the county relies on the terms "building" and "mobile home" to classify structures. A building is "any structure used, designed or intended to be used for the protection, shelter or enclosure of persons, animals or property." It is clear that Hansman's structure is intended for the protection, shelter and enclosure of persons.

Hansman v. Oneida Co., 123 Wis.2d 511, 513, 366 N.W.2d 901 (Ct. App. 1985).

3. The offense of burglary is complete upon the slightest entry by the defendant into any one of the places described in § 943.10(1)(a)-(f) without the consent of the person in lawful possession, when such entry is made with the required intent. The least entry with any part of the body is sufficient. State v. Barclay, 54 Wis.2d 651, 655n.10, 196 N.W.2d 745 (1972).

The crime of burglary is completed once "the defendant jimmied the lock and pushed against the door, pushing it inward, [and making] entry onto the premises. . . . Whether he stepped in or, as he testified, later reached in to close the door, would not matter. It is not how or why the door was closed that matters. It is the fact that it was opened by a person with intent to steal that furnishes both entry and intent, the prerequisite for the crime of burglary." Morones v. State, 61 Wis.2d 544, 548-49, 213 N.W.2d 31 (1973).

4. The defendant's entry into the place involved was without consent if the person in lawful possession did not consent in fact or if consent was given under the circumstances provided by Wis. Criminal Code § 939.22(48)(a)-(c). "Consent to enter which is obtained by the use or threat of force or by pretense of legal authority is in legal effect entry 'without consent.' The same ordinarily is true of consent obtained because the person giving the consent is mistaken as to the nature of the thing to which he consents. . . ." 1953 Legislative Council Committee Report on the Criminal Code, page 102.

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Entry into a place when it is open to the public is not "without consent," see § 943.10(3). Thus, entry into a hotel lobby open to the public, although done with the intent to steal, is not burglary. Champlin v. State, 84 Wis.2d 621, 267 N.W.2d 295 (1978).

However, one who enters with consent may remain "at a time or place beyond his authority. 'Entry' in § 943.10(1)(a), Stats., must be construed to mean not only the simple act of passing through the outer wall of a structure but also the result of such action, namely, presence within the structure." Levesque v. State, 63 Wis.2d 412, 217 N.W.2d 317 (1974). Thus, an otherwise lawful entry became unlawful when Levesque hid himself in the false ceiling of the men's room and remained there until after the restaurant was closed.

State v. Schantek, 120 Wis.2d 79, 353 N.W.2d 832 (Ct. App. 1984), involved an entry of a gas station by an employee after regular business hours. The station closed at 9:00 p.m. and Schantek entered at around 11:30 p.m., using his own key. He took money from a cash box. The court upheld the conviction for burglary, stating that the extent of consent under these circumstances must be determined on the facts of each case:

> The task in most cases will be to determine the limits of such consent and the defendant's knowledge or lack of it.
>
> . . . . We do conclude, however, that the arrangement between Schantek and his employer clearly rendered certain presence inappropriate and thus beyond the limits of the employer's consent and Schantek's knowledge. A fair reading of the evidence does not allow for the strained conclusion that Benco gave Schantek all-encompassing consent to enter the premises at all times for all purposes – including criminal adventure. Nor does the evidence remotely allow for Schantek's claim of knowledge of such all-encompassing consent. We therefore conclude under the facts of this case that the employer did not give Schantek consent to enter the premises, and Schantek had knowledge of such nonconsent.

120 Wis.2d 79, 85.

The Schantek approach was applied in State v. Karow, 154 Wis.2d 375, 453 N.W.2d 181 (Ct. App. 1990). In Karow, the defendant claimed the entry was with consent because the victim allowed him to come into the house and use the telephone. After entering, Karow and accomplices killed the victim. The court of appeals affirmed the burglary conviction, finding that the entry was "without consent" because of an "implied limitation on the scope of the invitation to enter":

> We hold that an implied limitation on the scope of the consent to enter may be recognized, and we recognize it here. The record supports an inference, not patently incredible, that the consent Brown granted to Karow, a stranger, was limited to a specific area and a single purpose. That consent can in no way be reasonably construed to extend beyond the purpose for which it was granted.

154 Wis.2d 375, 384.

5. Under § 943.10, the question is one of lawful possession and not legal title. Ordinarily, the question of who is in lawful possession, while presenting a mixed question of law and fact, can be decided by the court as a matter of law on admitted or undisputed facts.

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6. Knowledge that the entry is without consent is an element of the offense of burglary because of the standard interpretation of criminal statutes required by § 939.23(3): Where the word "intentionally" is used, "the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" The decision in Hanson v. State, 52 Wis.2d 396, 190 N.W.2d 129 (1971), is sometimes cited for the contrary position. However, Hanson involved a defendant's postconviction challenge to the validity of his guilty plea and simply held that there was an adequate factual basis for a finding that there was no consent in fact to the defendant's entry. Under such circumstances, said the court, there was no additional burden on the state to show that the defendant did not "purport to be acting under legal authority," one of the alternatives to "no consent in fact" provided in the statutory definition of without consent, § 939.22(48). Recent decisions have reaffirmed that knowledge that entry is without consent is an essential element of burglary. See State v. Schantek, supra, note 4, and State v. Wilson, 160 Wis.2d 774, 467 N.W.2d 130 (Ct. App. 1991).

7. The problem of circumstantially proving intent to steal has received considerable attention from the Wisconsin Supreme Court. The present rule provides that while "intent to steal will not be inferred from the fact of entry alone," "'additional circumstances such as time, nature of the place entered, method of entry, identity of the accused and other circumstances, without proof of actual larceny, can be sufficient to permit a reasonable person to conclude the defendant entered with an intent to steal.'" State v. Barclay, 54 Wis.2d 651, 654, 196 N.W.2d 745 (1972), citing Strait v. State, 41 Wis.2d 552, 562, 164 N.W.2d 505 (1969). Also see State v. Holmstrom, 43 Wis.2d 465, 168 N.W.2d 574 (1969), and Bethards v. State, 45 Wis.2d 606, 173 N.W.2d 634 (1970), overruling State v. Kennedy, 15 Wis.2d 600, 113 N.W.2d 372 (1962). For a complete review of prior cases, see State v. Bowden, 93 Wis.2d 574, 288 N.W.2d 139 (1980).

8. The instruction uses "take and carry away" since it is the most common type of theft and the one that would most often be involved in a burglary case. In a proper case, the other alternatives in the theft statute ("use, transfer, conceal, or retain possession of . . .") should be substituted.

9. "Intent to deprive the owner permanently of possession" is used as the most common type of "intent to steal." It is possible that a burglary offense could involve mental states for other types of stealing. See, for example, theft under § 943.20(1)(b), which involves "intent to convert to his own use" and theft under § 943.10(1)(c), which requires intent to deprive a pledgee or other person having a superior right of possession.

10. The bracketed material should be added if there is evidence that, for example, the defendant believed he was reclaiming his own property. Referred to as "right to recapture," "claim of right," or "self-help," this defensive matter tends to negate either the "property of another" or the "knew it was property of another" elements. The rule applies to burglary, see State v. Pettit, 171 Wis.2d 627, 492 N.W.2d 633 (Ct. App. 1992), and is discussed at Wis JI-Criminal 710, Law Note: Right to Recapture.

11. Evidence of the defendant's possession of recently stolen property may often be offered to support a finding of intent to steal. If an instruction on the effect of such evidence is requested, see Wis JI-Criminal 170, Circumstantial Evidence, and 173, Possession of Recently Stolen Property.

12. Burglary, as defined in § 943.10(1), is punished as a Class C felony. The penalty increases to a Class B felony if a burglary is committed under any of the circumstances defined in subsec. (2). The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Instructions are provided for three of the four factors

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identified in subsec. (2): while armed (see Wis JI-Criminal 1425A); while unarmed, but the person arms himself or herself while in the enclosure (see Wis JI-Criminal 1425B); while in the enclosure, the person uses explosives to open a depository (there is no instruction for this alternative); and, while in the enclosure, the person commits a battery upon a person lawfully therein (see Wis JI-Criminal 1425C).

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1424 BURGLARY WITH INTENT TO COMMIT A FELONY[1] — § 943.10(1)

Statutory Definition of the Crime

Burglary, as defined in § 943.10 of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building[2] without the consent of the person in lawful possession and with intent to commit a felony therein.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally entered a building.[3]

2. The defendant entered the building without the consent[4] of the person in lawful possession.[5]

3. The defendant knew that the entry was without consent.[6]

4. The defendant entered the building with intent to commit (state felony), [that is, that the defendant intended to commit (state felony) at the time the defendant entered the building].[7]

> [IF THE JURY IS ALSO INSTRUCTED ON THE INTENDED FELONY, IT IS SUFFICIENT TO REFER TO THAT INSTRUCTION AND NOT REPEAT IT HERE.]
>
> [IF THE INTENDED FELONY IS NOT CHARGED, DEFINE THE CRIME, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE.]

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When Must Intent Exist?

The intent to commit a felony must be formed before entry is made. The intent to commit (state felony) which is an essential element of burglary is no more or less than the mental purpose[8] to commit (state felony) formed at any time before the entry, which continued to exist at the time of the entry.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF ONE OF THE AGGRAVATING FACTORS SET FORTH IN § 943.10(2) IS CHARGED AND SUPPORTED BY THE EVIDENCE, ADD WIS JI-CRIMINAL 1425A, 1425B, OR 1425C.[9]

COMMENT

Wis JI-Criminal 1421 was originally published in 1966 and revised in 1985, 1991, 1994, 1995, 1998, and 2001. The 2001 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment. This revision was approved by the Committee in July 2019. It added to footnote 2 of the comment.

1. This instruction is drafted for burglary with the "intent to commit a felony." If "intent to steal" is charged, see Wis JI-Criminal 1421. For burglary offenses committed "while armed" or under aggravating circumstances as prohibited by § 943.10(2), see Wis JI-Criminal 1425A, 1425B, and 1425C.

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In State v. O'Neill, 121 Wis.2d 300, 359 N.W.2d 906 (1984), the Wisconsin Supreme Court held that ". . . the legislature intended to include only offenses against persons and property within the felonies which could form the basis of a burglary charge" under subsec. 943.10(1)(a). O'Neill involved a burglary charge against a campus police supervisor who allegedly conducted an illegal entry and search of an apartment. The theory of prosecution was that the illegal entry and search constituted misconduct in public office which could serve as the underlying felony for the burglary charge. The supreme court reversed the burglary conviction, holding that "misconduct in public office is not the type of felony contemplated by sec. 943.10(1)."

The text of the instruction has not been changed to accommodate the O'Neill decision because the Committee concluded that the question of whether a particular felony could form the basis for a burglary charge would be one of law for the trial court rather than one of fact for the jury.

In State v. Semrau, 2000 WI APP 54, 233 Wis.2d 508, 608 N.W.2d 376, the court applied O'Neill and concluded that bail jumping could be the intended felony upon which a burglary charge can be based.

"Felon in possession of a firearm" in violation of § 941.29 is a crime against persons or property and can be the basis for the intent to commit a felony element of burglary. State v. Steele, 2001 WI APP 34, ¶ 21, 241 Wis.2d 269, 625 N.W.2d 595.

2. The model instruction is drafted for a case involving entry into a "building." It must be modified if entry involved any of the other places listed in § 943.10(1)(a) through (f): any building or dwelling; an enclosed railroad car; an enclosed portion of any ship or vessel; a locked enclosed cargo portion of a truck or trailer; a motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or a room in any of the above.

The instruction has never included a definition of "building." The meaning of the term has been considered to be the same for burglary and arson cases. In an arson case, State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991), the Wisconsin Supreme Court held it was error for the trial court to state that "a mobile home is a building." The court said this created a "mandatory conclusive presumption . . . regarding an element of the arson offense." However, the court further held that the error was harmless because it played no role in the jury's verdict:

> We conclude that no rational juror could plausibly find that the structure in question was a mobile home without also finding that the structure was a building. . . . If the jury found this structure to be a mobile home, as that term is commonly understood, this finding would be the 'functional equivalent' of finding that the structure was a building.

160 Wis.2d 722, 740.

In United States of America v. Franklin, 2019 WI 64, 387 Wis.2d 259, 272, 928 N.W.2d 545, the Wisconsin Supreme Court concluded that the locational alternatives provided in Wis. Stat. § 943.01(1m)(a)-(f) are alternative factual means of committing one element of burglary. Providing context to this holding, the court referenced an example previously incorporated in State v. Pinder, 2018 WI 106, ¶60, 384 Wis. 2d 416, 919 N.W.2d 568. Although the issue in Pinder concerned the validity of a search warrant issued for the placement and use of a GPS tracking device on a motor vehicle, the court did make a ruling in which it denied an ineffective assistance of counsel claim for failure to object to the burglary

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jury instruction Wis. JI-Criminal 1421. Addressing this claim, the court emphasized the latitude afforded in the crafting of a burglary jury instruction so as to comport with the evidence of the case, noting that:

> "[w]hile the circuit court could have used the phrase 'a room within a building' instead of the words 'office' or 'building,' the facts adduced would not confuse the jury as to what it was called upon to decide regardless of which of these words might be used." Id. at 456.

The court in Franklin cited the analysis of the statutory text, the legislative history and context of the statute, along with the nature of the conduct, and the appropriateness of multiple punishments in its conclusion that Wis. Stat. § 943.01 "identifies alternative means of committing one element of the crime of burglary under § 943.01 (1m)(a)-(f)." Franklin at 273. Furthermore, the court found that the crime of burglary does not include a separate locational element, and jury unanimity on finding guilt beyond a reasonable doubt as to locational alternatives provided in § 943.01(1m)(a)-(f) is not necessary to convict. Id. 273.

If a definition of "building" is necessary, resort to a standard dictionary may be helpful. For example, Webster's Ninth New Collegiate Dictionary provides that a "building" refers to "a usually roofed and walled structure built for permanent use (as for a dwelling)."

In Clark v. State, 69 Wis. 203, 33 N.W. 436 (1887), the issue was whether an unfinished house from which tools were taken was covered by § 4409 R.S. which made it a burglary to break "and enter in the night-time any office, shop, or any other building not adjoining or occupied with any dwelling house, or any ship, steamboat, vessel, railroad freight car or passenger car, with intent to commit the crime of larceny or other felony." The court held that the unfinished house was a "building" for purposes of burglary and defined the term as follows:

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4. The defendant's entry into the place involved was without consent if the person in lawful possession did not consent in fact or if consent was given under the circumstances provided by Wis. Criminal Code § 939.22(48)(a)-(c). "Consent to enter which is obtained by the use or threat of force or by pretense of legal authority is in legal effect entry 'without consent.' The same ordinarily is true of consent obtained because the person giving the consent is mistaken as to the nature of the thing to which he consents. . . ." 1953 Legislative Council Committee Report on the Criminal Code, page 102.

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However, one who enters with consent may remain "at a time or place beyond his authority. 'Entry' in § 943.10(1)(a), Stats., must be construed to mean not only the simple act of passing through the outer wall of a structure but also the result of such action, namely, presence within the structure." Levesque v. State, 63 Wis.2d 412, 217 N.W.2d 317 (1974). Thus, an otherwise lawful entry became unlawful when Levesque hid himself in the false ceiling of the men's room and remained there until after the restaurant was closed.

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> The task in most cases will be to determine the limits of such consent and the defendant's knowledge or lack of it.
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> . . . . We do conclude, however, that the arrangement between Schantek and his employer clearly rendered certain presence inappropriate and thus beyond the limits of the employer's consent and Schantek's knowledge. A fair reading of the evidence does not allow for the strained conclusion that Benco gave Schantek all-encompassing consent to enter the premises at all times for all purposes – including criminal adventure. Nor does the evidence remotely allow for Schantek's claim of knowledge of such all-encompassing consent. We therefore conclude under the facts of this case that the employer did not give Schantek consent to enter the premises, and Schantek had knowledge of such nonconsent.

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154 Wis.2d 375, 384.

5. Under § 943.10, the question is one of lawful possession and not legal title. Ordinarily, the question of who is in lawful possession, while presenting a mixed question of law and fact, can be decided by the court as a matter of law on admitted or undisputed facts.

6. Knowledge that the entry is without consent is an element of the offense of burglary because of the standard interpretation of criminal statutes required by § 939.23(3): Where the word "intentionally" is used, "the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" The decision in Hanson v. State, 52 Wis.2d 396, 190 N.W.2d 129 (1971), is sometimes cited for the contrary position. However, Hanson involved a defendant's postconviction challenge to the validity of his guilty plea and simply held that there was an adequate factual basis for a finding that there was no consent in fact to the defendant's entry. Under such circumstances, said the court, there was no additional burden on the state to show that the defendant did not "purport to be acting under legal authority," one of the alternatives to "no consent in fact" provided in the statutory definition of without consent, § 939.22(48). Recent decisions have reaffirmed that knowledge that entry is without consent is an essential element of burglary. See State v. Schantek, supra, note 4, and State v. Wilson, 160 Wis.2d 774, 467 N.W.2d 130 (Ct. App. 1991).

7. The intent to commit the felony must exist at the time the defendant entered the place. It is not sufficient that the defendant formed an intent to commit the felony after entry. Such intent, however, is usually proved circumstantially by what defendant did after he entered the place.

Care must be taken to assure that the crime intended was a felony. In State v. Gilbertson, 69 Wis.2d 587, 230 N.W.2d 874 (1975), a burglary conviction was reversed because there was insufficient proof of intent to commit a felony. The underlying crime was alleged to be criminal damage to property which becomes a felony only if there is intent to reduce the property's value by more than $1,000. The insufficiency of the evidence on this point required reversal.

8. Under the Criminal Code, the phrase "with intent to" means that the defendant either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result. Subsection 939.23(4) and Wis JI-Criminal 923A and 923B.

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9. Burglary, as defined in § 943.10(1), is punished as a Class C felony. The penalty increases to a Class B felony if a burglary is committed under any of the circumstances defined in subsec. (2). The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Instructions are provided for three of the four factors identified in subsec. (2): while armed (see Wis JI-Criminal 1425A); while unarmed, but the person arms himself or herself while in the enclosure (see Wis JI-Criminal 1425B); while in the enclosure, the person uses explosives to open a depository (there is no instruction for this alternative); and, while in the enclosure, the person commits a battery upon a person lawfully therein (see Wis JI-Criminal 1425C).

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1440 CRIMINAL TRESPASS TO AN ENERGY PROVIDER PROPERTY — § 943.143

Statutory Definition of the Crime

Criminal trespass to an energy provider property, as defined in § 943.143 of the Criminal Code of Wisconsin, is committed by one who intentionally enters an energy provider property without the consent of the energy provider that owns, leases, or operates the property.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally entered an energy provider property.

   ("Energy provider property" means property that is part of an electric, natural gas, oil, petroleum, refined petroleum product, renewable fuel, water, or chemical generation, transmission, or distribution system and that is owned, leased, or operated by an energy provider.)[2]

   (A decommissioned nuclear power plant is an energy provider.)[3]

   "Intentionally" requires that the defendant had the purpose of entering an energy provider property.[4]

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2. The defendant entered an energy provider property without the lawful authority and consent of the energy provider.

The phrase "without consent" means that there was no consent in fact.[5]

Deciding About Purpose and Knowledge

You cannot look into a person's mind to find purpose and knowledge. Purpose and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1440 was approved by the Committee in February 2020.

Section 943.143 was created by 2015 Wisconsin Act 158. The statute was modified by 2019 Wisconsin Act 33 to expand the scope of the enhanced penalty for intentionally causing damage and trespassing to include property owned, leased, or operated by public water utilities, cooperative associations producing or furnishing water, and companies that operate gas, oil, petroleum, refined petroleum product, renewable fuel, water, or chemical generation storage transportation or delivery system.

1. Section 943.143(3) does not apply to any of the following:

(a) Any person who is:

1. Monitoring compliance with public or worker safety laws, wage and hour requirements, or other statutory requirements.
2. Engaging in picketing occurring at the workplace that is otherwise lawful and arises out of a bona fide labor dispute including any controversy concerning any of the following:

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wages or salaries; hours; working conditions; benefits, including welfare, sick leave, insurance, pension or retirement provisions; or the managing or maintenance of collective bargaining agreements and the terms to be included in those agreements.

3. Engaging in union organizing or recruitment activities that are otherwise lawful including attempting to reach workers verbally, in writing, and in the investigation of non-union working conditions.

(b) An exercise of a person's right of free speech or assembly that is otherwise lawful.

2. Select qualifying business activity.

3. "Specify the applicable category of energy provider." Section 943.143(1)(a) provides:

"Energy provider" means any of the following:

1. A public utility under s. 196.01 (5) (a) that is engaged in any of the following: (a) The production, transmission, delivery, or furnishing of heat, power, light, or water. (b) The transmission or delivery of natural gas.
2. A transmission company under s. 196.485 (1) (ge).
3. A cooperative association organized under ch. 185 for the purpose of producing or furnishing heat, light, power or water for its members.
4. A wholesale merchant plant under s. 196.491 (1) (w), except that "wholesale merchant plant" includes an electric generating facility or an improvement to an electric generating facility that is subject to a leased generation contract, as defined in s.196.52 (9) (a) 3.
5. A decommissioned nuclear power plant.
6. A company that operates a gas, oil, petroleum, refined petroleum product, renewable fuel, water, or chemical generation, storage transportation, or delivery system that is not a service station, garage, or other place where gasoline or diesel fuel is sold at retailer offered for sale at retail.

The court should inquire whether the parties agree that the entity whose property is at issue is a qualified energy provider. If there is no agreement, the court should require that the state designate under which subsection they are proceeding.

4. Section 939.23(3).

5. Section 939.22(48). Also see Wis JI-Criminal 948.

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1441B THEFT: PENALTY FACTORS — § 943.20(3)(d) and (3)(e)

ADD ONE OF THE FOLLOWING QUESTIONS IF FELONY THEFT IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN SUB. (3)(d) OR (3)(e) IS ESTABLISHED.

If you find the defendant guilty, you must answer the following question:

FOR CHARGES UNDER SUB. (3)(d)1.

["Was the property taken a domestic animal?"][1]

FOR CHARGES UNDER SUB. (3)(d)3.

["Was the property taken from a building which has been destroyed or left unoccupied because of physical disaster, riot, bombing or the proximity of battle?"][2]

FOR CHARGES UNDER SUB. (3)(d)4.

["Was the property taken after physical disaster, riot, bombing or the proximity of battle has necessitated its removal from a building?"][3]

FOR CHARGES UNDER SUB. (3)(d)5.

["Was the property taken a firearm?"[4]

"Firearm" means a weapon that acts by the force of gunpowder.]

FOR CHARGES UNDER SUB. (3)(d)6.

["Was the property taken from (an individual at risk) (a patient or resident of a (name type of facility under s. 940.295(2)))?"][5]

FOR CHARGES UNDER SUB. (3)(e).

["Was the property taken from (the person of another) (a corpse)?"][6]

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[This requires that the property was taken from the body of the person in possession of the property, or that the person had immediate control over the property.][7]

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer to the question is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1441B was originally published in 1999 and revised in 2002, 2003, 2008, and 2018. The 2018 revision made an editorial correction and added to footnote 6. This revision was approved by the Committee in December 2019; it added language to the bracketed requirement for charges under sub. (3)(e), and added footnote 7.

This instruction addresses the six penalty-increasing factors set forth in § 943.20(3)(d) and (e). Theft from person – set forth in subdiv. (3)(e) – was formerly covered by a separate instruction, Wis JI-Criminal 1442, but that instruction has been withdrawn in favor of including all the factors together in this instruction. Each of the factors in sub. (3)(d) increases the penalty to a Class H felony; theft from person under sub. (3)(e) is a Class G felony. Section 943.20(3)(d), as amended by 2001 Wisconsin Act 109.

As with the value question in theft cases, see Wis JI-Criminal 1441, the Committee recommends that these factors be presented to the jury in the form of a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of theft under Wis. Stat. § 943.20, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Was the property taken (repeat the essential facts in the question)?"

1. This is the factor in subdiv. 1. of § 943.20(3)(d). "Domestic animal" is defined as follows for the purposes of Chapter 174: "'Domestic animal' includes livestock, dogs, and cats." § 174.001(2g).

2. This is the factor set forth in subdiv. 3. of § 943.20(3)(d).

3. This is the factor set forth in subdiv. 4. of § 943.20(3)(d).

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4. This is the factor in subdiv. 5. of § 943.20(3)(d). The definition of "firearm" in the next sentence is the standard one used in the uniform instructions. It is based on Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

5. These are the factors set forth in subdiv. 6. of § 943.20(3)(d). The facilities "under s. 940.295(2)" include a variety of facilities, most of which involve providing health care or related services. See note 1, Wis JI-Criminal 1271. 2005 Wisconsin Act 388 changed the reference to "individual at risk" from "vulnerable adult." "Individual at risk" is defined as follows in § 940.20(2)(ae): "'Individual at risk' means an elder adult at risk or an adult at risk." Section 943.20(2)(a) provides that "'Adult at risk' has the meaning given in s. 55.01(1e)." Section 943.20(2)(ad) provides that "'Elder adult at risk' has the meaning provided in s. 46.90(1)(br)." Definitions based on those cross references, which also apply to violations of § 940.285, are provided in Wis JI-Criminal 1268.

6. These are the factors in § 943.20(3)(e). The explication of "from the person" in the next sentence is what was formerly provided in Wis JI-Criminal 1442, Theft From Person. In State v. Hughes, 218 Wis.2d 538, 548, 582 N.W.2d 49 (Ct. App. 1998), the court concluded that "theft 'from the person' encompasses the taking of property from the wheelchair of one sitting in the wheelchair at the time of the taking." Hughes did not state a generally applicable definition of "from the person" and expressly provided that the court "refrain[ed] from embracing either a narrow or broad standard that would necessarily apply to other factual situations." 218 Wis.2d 538, 548, note 10. Also see, State v. Graham, 2000 WI App 138, 237 Wis.2d 620, 614 N.W.2d 504, finding the evidence sufficient to prove "theft from person"; and State v. Tidwell, 2009 WI App 153, 321 Wis.2d 596, 774 N.W.2d 650, finding the evidence sufficient to prove "attempted theft from person."

"'Corpse' means the dead body of a human being." American Heritage Dictionary of the English Language, 3rd Edition, 1992.

7. In State v. Tidwell, 321 Wis.2d 596, 774 N.W.2d 650, 2009 WI App 153, the defendant argued that the evidence was insufficient to find him guilty on the charge of attempted theft from a person as the property he attempted to steal, a cash register on a counter, was not connected in any way to the victim's person. After reviewing the legislative history of § 943.20(3) the court of appeals disagreed and concluded that the intent of the "from the person" penalty enhancer was to "cove[r] circumstances which made stealing particularly dangerous and undesirable." It was the victim's constructive possession of the property which made the attempted theft particularly dangerous and undesirable. Id. at ¶¶8-12.

The Committee concluded that acts of theft in which the victim has immediate control over the property in question fall into the category of particularly dangerous and undesirable circumstances, and therefore constitutes theft from a person.

See JI 920 Possession.

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1498 RETAIL THEFT[1] — § 943.50(1m)(a) (e)

Statutory Definition of the Crime

Retail theft, as defined in § 943.50(1m) of the Criminal Code of Wisconsin, is committed by one who intentionally (alters the indicated price or value of) (takes and carries away) (transfers) (conceals) (retains possession of)[2] merchandise held for resale[3] by a merchant without consent and with the intent to deprive the merchant permanently of possession or the full purchase price of such merchandise.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (altered the indicated price or value of) (took and carried away) (transferred) (concealed) (retained possession of) (property involved).[4]
2. The (property involved) was merchandise held for resale[5] by a merchant.[6]
3. The defendant knew that (property involved) was merchandise held for resale[7] by a merchant.
4. The merchant did not consent[8] to (altering the indicated price or value of) (taking and carrying away) (transferring) (concealing) (retaining possession of) (property involved).

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5. The defendant knew that the merchant did not consent.[9]

6. The defendant intended to deprive the merchant permanently of (possession) (any portion of its purchase price) of the merchandise.[10]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY RETAIL THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE MERCHANDISE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[11]

Determining Value

If you find the defendant guilty, answer the following question:

("Was the value of the merchandise more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the merchandise more than $5,000?"

Answer: "yes" or "no.")

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("Was the value of the merchandise more than $500?"

Answer: "yes" or "no.")

"Value" means the (merchant's stated price of the merchandise) (the difference between the merchant's stated price of the merchandise and the altered price).[12]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

COMMENT

Wis JI-Criminal 1498 was originally published in 1974 and revised in 1977, 1980, 1983, 1991, 1999, 2002, 2003, 2012, and 2019. This revision was approved by the Committee in December 2019; it adds to the comment.

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. The amount distinguishing misdemeanors from felonies was decreased from $2,500 to $500 by 2011 Wisconsin Act 174. [Effective date: April 17, 2012.]

Act 174 also created ss. 943.50(4m) which provides that "[W]hoever violates sub. (1m) (a), (b), (c), (d), (e), or (f) is guilty of a Class I felony if all of the following apply:

(a) The value of the merchandise does not exceed $500.
(b) The person agree or combines with another to commit the violation.
(c) The person intends to sell the merchandise by means of the Internet."

2011 Wisconsin Act 110 amended § 943.50 to cover theft of services. See Wis JI-Criminal 1498C.

The 1999 revision reflected changes made in § 943.50 by 1997 Wisconsin Act 262, effective date: June 23, 1998. This instruction covers the alternative ways of committing retail theft that were prohibited by § 943.50 before the changes made by Act 262. These alternatives are defined in sub. (1m) (a) through (e) of the amended statute. New alternatives relating to "theft detection devices," "theft detection shielding devices" and "theft detection device removers" are defined in new subs. (1m)(f), (g), and (h). See Wis JI-Criminal 1498A and 1498B.

Act 262 also repealed former sub. (2) which had provided that intentional concealment of merchandise "beyond the last station for receiving payments," for example, was "evidence of intent. . . ." Paragraphs addressing those provisions [and treating them in the same way as "prima facie evidence" provisions] have been deleted from the instruction.

In State v. Lopez, 2019 WI 101, 389 Wis.2d 156, 936 N.W.2d 125, the Wisconsin Supreme Court affirmed the court of appeals decision in State v. Lopez, 2019 WI App 2, 385 Wis.2d 482, 922 N.W.2d 855, which held that the State may charge multiple acts of retail theft as one continuous offense pursuant

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to § 971.36(3)(a). Nothing in § 971.36(3)(a) indicates that the legislature intended to limit the provision to a specific type or types of theft, therefore the statute is applicable to various types of theft, including retail theft under § 943.50(1m)(a)-(e).

1. The title of § 943.50 was changed from "shoplifting" to "retail theft" by Chapter 270, Laws of 1981. The change was effective April 27, 1981. Additional changes made by Chapter 270 were: extending the statute's coverage "to include" property of the merchant; cross referencing the definition of "merchant" in the Uniform Commercial Code; providing a new definition of value; expanding the immunity of one who detains a suspected violator of the statute; and providing for the admission of photographs of the merchandise in lieu of producing the merchandise itself.

2011 Wisconsin Act 110 changed the title of § 943.50 to "Retail Theft; Theft of Services."

2. The Committee recommends using only the verb or verbs which appropriately describe the form of retail theft alleged or indicated by the evidence. There is no authority specific to this statute requiring election of one alternative. However, cases interpreting the theft statute, § 943.20, address a closely comparable situation and hold that the statute identifies different ways of committing the offense: by taking and carrying way, or by using, by transferring, by concealing, or by retaining possession of property of another. The alternatives may not be charged in the disjunctive, Jackson v. State, 92 Wis.2d 1, 284 N.W.2d 685 (Ct. App. 1979); the jury must unanimously agree on the manner in which the statute was violated, State v. Seymour, 183 Wis.2d 682, 515 N.W.2d 874 (1994). See Wis JI-Criminal 517 for an instruction on jury agreement.

3. The amendment of § 943.50 by Chapter 270, Laws of 1981, extended the coverage of the statute to include "property of the merchant." In a case where the merchant's personal property was taken, substitute "property of the merchant" for "merchandise held for resale."

4. "Intentionally" requires that the defendant acted with the purpose to do the thing or cause the result specified "or is aware that his or her act is practically certain to cause that result." § 939.23(3). See Wis JI-Criminal 923A and 923B. "Intentionally" also requires knowledge of those facts necessary to make the conduct criminal that follow the word in the statute. See § 939.23(3).

5. See note 3, supra.

6. Section 943.50(1), as created by Chapter 270, Laws of 1981, provides that "merchant" includes those identified in § 402.104(3) as well as any innkeeper, motelkeeper, or hotelkeeper.

Section 402.104(3) defines "merchant" as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill.

7. See note 4, supra.

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8. The phrase "without consent" is defined in § 939.22(48)(a)-(c). That definition should be read to the jury at this point if consent is at issue. See Wis JI-Criminal 948.

9. See note 4, supra.

10. When appropriate add: "or is aware that his conduct is practically certain to cause that result." See § 939.23(4) and Wis JI-Criminal 923B.

When appropriate add: "or creates a serious risk of permanent loss by acts which manifest a gross indifference to the permanent loss of the property," Sartin v. State, 44 Wis.2d 138, 147, 170 N.W.2d 727 (1969), citing Baldwin, "Criminal Misappropriations in Wisconsin—Part I," 44 Marq. L. Rev. 253, 267 (1960).

11. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty are set forth in § 943.50(4):

- if the value of the property does not exceed $500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of the property exceeds $10,000, the offense is a Class G felony.

The above reflects changes made by 2011 Wisconsin Act 174. Only the threshold for the Class I felony was changed – it was reduced to $500 from $2,500.

The questions in the instruction omit the upper limits of the categories for Class I and Class H felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

12. Section 943.50(1)(b), as created by Chapter 270, Laws of 1981, provides a definition of "value" for the purposes of "retail theft" cases:

(b) "Value of merchandise" means:

1. For property of the merchant, the value of the property; or
2. For merchandise held for resale, the merchant's stated price of the merchandise or, in the event of altering, transferring or removing a price marking or causing a cash register or other sales devise to reflect less than the merchant's stated price, the difference between the merchant's stated price of the merchandise and the altered price.

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1498A RETAIL THEFT: REMOVING A THEFT DETECTION DEVICE — § 943.50(1m)(f)

Statutory Definition of the Crime

Section 943.50(1m)(f) of the Criminal Code of Wisconsin is violated by one who, while anywhere in a merchant's store, intentionally removes a theft detection device from merchandise held for resale[1] without the merchant's consent and with intent to deprive the merchant permanently of possession[2] of the merchandise.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant, while in the merchant's store, intentionally removed a theft detection device from (property involved).

   "Theft detection device" means any tag or other device that is used to prevent or detect theft and that is attached to merchandise held for resale by a merchant.[3]

2. (Property involved) was merchandise held for resale by a merchant.[4]

3. The defendant knew that (property involved) was merchandise held for resale[5] by a merchant.

4. The merchant did not consent[6] to removal of a theft detection device.

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5. The defendant knew that the merchant did not consent.

6. The defendant intended to deprive the merchant permanently of possession of the merchandise.[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY RETAIL THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE MERCHANDISE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[9]

Determining Value

If you find the defendant guilty, answer the following question:

("Was the value of the merchandise more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the merchandise more than $5,000?"

Answer: "yes" or "no.")

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("Was the value of the merchandise more than $500?"

Answer: "yes" or "no.")

["Value" means the (merchant's stated price of the merchandise) (the difference between the merchant's stated price of the merchandise and the altered price).[10]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

COMMENT

Wis JI-Criminal 1498A was originally published in November 1998 and revised in 2003, 2012, and 2019. This revision was approved by the Committee in December 2019; it adds to the comment.

This instruction is for the offense defined in sub. (1m)(f) of § 943.50, which was created by 1997 Wisconsin Act 262 [effective date: June 23, 1998].

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. This amount distinguishing misdemeanors from felonies was decreased from $2,500 to $500 by 2011 Wisconsin Act 174. [Effective date: April 17, 2012.]

Act 174 also created ss. 943.50(4m) which provides that "[W]hoever violates sub. (1m) (a), (b), (c), (d), (e), or (f) is guilty of a Class I felony if all of the following apply:

(a) The value of the merchandise does not exceed $500.
(b) The person agree or combines with another to commit the violation.
(c) The person intends to sell the merchandise by means of the Internet."

In State v. Lopez, 2019 WI 101, 389 Wis.2d 156, 936 N.W.2d 125, the Wisconsin Supreme Court affirmed the court of appeals decision in State v. Lopez, 2019 WI App 2, 385 Wis.2d 482, 922 N.W.2d 855, which held that the State may charge multiple acts of retail theft as one continuous offense pursuant to § 971.36(3)(a). Nothing in § 971.36(3)(a) indicates that the legislature intended to limit the provision to a specific type or types of theft, therefore the statute is applicable to various types of theft, including retail theft under § 943.50(1m)(a) (e).

1. Section 943.50(1m)(f) prohibits removing a theft detection device "from merchandise held for resale by a merchant or property of a merchant." The instruction is drafted for an offense involving "property held for resale by a merchant" and must be modified if "property of a merchant" was involved.

2. The instruction does not include the following alternative from the statute: intent to deprive the merchant permanently of "the full purchase price" of the merchandise. The Committee concluded that a shielding device would be used only to steal the merchandise, not to reduce its stated price.

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3. This is the definition provided in § 943.50(1)(ar).

4. Section 943.50(1), as created by Chapter 270, Laws of 1981, provides that "merchant" includes those identified in § 402.104(3) as well as any innkeeper, motelkeeper, or hotelkeeper.

Section 402.104(3) defines "merchant" as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill.

5. See note 1, supra.

6. The phrase "without consent" is defined in § 939.22(48)(a)-(c). That definition should be read to the jury at this point if consent is at issue. See Wis JI-Criminal 948.

7. When appropriate add: "or is aware that his conduct is practically certain to cause that result." See § 939.23(4) and Wis JI-Criminal 923B.

8. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee has concluded that this shorter version is appropriate for most cases. The complete, traditional, statement is found at Wis JI-Criminal 923A.

9. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty are set forth in § 943.50(4):

- if the value of the property does not exceed $500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of the property exceeds $10,000, the offense is a Class G felony.

The above reflects changes made by 2011 Wisconsin Act 174. Only the threshold for the Class I felony was changed – it was reduced to $500 from $2,500.

The questions in the instruction omit the upper limits of the categories for Class I and Class H felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

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10. Section 943.50(1)(b), as created by Chapter 270, Laws of 1981, provides a definition of "value" for the purposes of "retail theft" cases:

(b) "Value of merchandise" means:

1. For property of the merchant, the value of the property; or

2. For merchandise held for resale, the merchant's stated price of the merchandise or, in the event of altering, transferring or removing a price marking or causing a cash register or other sales devise to reflect less than the merchant's stated price, the difference between the merchant's stated price of the merchandise and the altered price.

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1498B RETAIL THEFT: USING A THEFT DETECTION SHIELDING DEVICE — § 943.50(1m)(g)

Statutory Definition of the Crime

Section 943.50(1m)(g) of the Criminal Code of Wisconsin is violated by one who uses [or possesses with intent to use] a theft detection shielding device to shield merchandise held for resale[1] from being detected by a theft alarm sensor and does so without the merchant's consent and with intent to deprive the merchant permanently of possession[2] of the merchandise.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant used [or possessed with intent to use] a theft detection shielding device to shield (property involved) from being detected by a theft alarm sensor.

   "Theft detection shielding device" means any laminated or coated bag or device designed to shield merchandise held for resale by a merchant from being detected by an electronic or magnetic theft alarm sensor.[3]

2. (Property involved) was merchandise held for resale by a merchant.[4]

3. The defendant knew that (property involved) was merchandise held for resale[5] by a merchant.

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4. The merchant did not consent[6] to use of [or possession with intent to use] a theft detection shielding device to shield (property involved) from being detected by a theft alarm sensor.

5. The defendant knew that the merchant did not consent.

6. The defendant intended to deprive the merchant permanently of possession of the merchandise.[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY RETAIL THEFT IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE MERCHANDISE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[9]

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Determining Value

If you find the defendant guilty, answer the following question:

("Was the value of the merchandise more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the merchandise more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the merchandise more than $500?"

Answer: "yes" or "no.")

["Value" means the (merchant's stated price of the merchandise) (the difference between the merchant's stated price of the merchandise and the altered price).[10]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

COMMENT

Wis JI-Criminal 1498B was originally published in 1998 and revised in 2003, 2012, and 2019. This revision was approved by the Committee in December 2019; it adds to the comment.

This instruction is for the offense defined in sub. (1m)(g) of § 943.50, which was created by 1997 Wisconsin Act 262 [effective date: June 23, 1998].

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. This amount distinguishing misdemeanors from felonies was decreased from $2,500 to $500 by 2011 Wisconsin Act 174. [Effective date: April 17, 2012.]

Act 174 also created ss. 943.50(4m) which provides that "[W]hoever violates sub. (1m) (a), (b), (c), (d), (e), or (f) is guilty of a Class I felony if all of the following apply:

(a) The value of the merchandise does not exceed $500.
(b) The person agree or combines with another to commit the violation.
(c) The person intends to sell the merchandise by means of the Internet."

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In State v. Lopez, 2019 WI 101, 389 Wis.2d 156, 936 N.W.2d 125, the Wisconsin Supreme Court affirmed the court of appeals decision in State v. Lopez, 2019 WI App 2, 385 Wis.2d 482, 922 N.W.2d 855, which held that the State may charge multiple acts of retail theft as one continuous offense pursuant to § 971.36(3)(a). Nothing in § 971.36(3)(a) indicates that the legislature intended to limit the provision to a specific type or types of theft, therefore the statute is applicable to various types of theft, including retail theft under § 943.50(1m)(a) (e).

1. Section 943.50(1m)(g) prohibits using, or possessing with intent to use, a theft detection shielding device to shield "merchandise held for resale by a merchant or property of a merchant." The instruction is drafted for an offense involving "property held for resale by a merchant" and must be modified if "property of a merchant" was involved.

2. The instruction does not include the following alternative from the statute: intent to deprive the merchant permanently of "the full purchase price" of the merchandise. The Committee concluded that a shielding device would be used only to steal the merchandise, not to reduce its stated price.

3. This is the definition provided in § 943.50(1)(at).

4. Section 943.50(1), as created by Chapter 270, Laws of 1981, provides that "merchant" includes those identified in § 402.104(3) as well as any innkeeper, motelkeeper, or hotelkeeper.

Section 402.104(3) defines "merchant" as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill.

5. See note 1, supra.

6. The phrase "without consent" is defined in § 939.22(48)(a)-(c). That definition should be read to the jury at this point if consent is at issue. See Wis JI-Criminal 948.

7. When appropriate add: "or is aware that his conduct is practically certain to cause that result." See § 939.23(4) and Wis JI-Criminal 923B.

8. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee has concluded that this shorter version is appropriate for most cases. The complete, traditional, statement is found at Wis JI-Criminal 923A.

9. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

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The amounts determining the penalty are set forth in § 943.50(4):

- if the value of the property does not exceed $500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $500 but not $5,000, the offense is a Class I felony;
- if the value of the property exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of the property exceeds $10,000, the offense is a Class G felony.

The above reflects changes made by 2011 Wisconsin Act 174. Only the threshold for the Class I felony was changed – it was reduced to $500 from $2,500.

The questions in the instruction omit the upper limits of the categories for Class I and Class H felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

10. Section 943.50(1)(b), as created by Chapter 270, Laws of 1981, provides a definition of "value" for the purposes of "retail theft" cases:

(b) "Value of merchandise" means:

1. For property of the merchant, the value of the property; or
2. For merchandise held for resale, the merchant's stated price of the merchandise or, in the event of altering, transferring or removing a price marking or causing a cash register or other sales devise to reflect less than the merchant's stated price, the difference between the merchant's stated price of the merchandise and the altered price.

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1498C THEFT OF SERVICES — § 943.50(1r)

Statutory Definition of the Crime

Theft of services, as defined in § 943.50(1r) of the Criminal Code of Wisconsin, is committed by one who, having obtained a service from a service provider, absconds and intentionally fails or refuses to pay for the service and does so without the service provider's consent and with intent to deprive the service provider permanently of the full price of the service.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained a service from a service provider.

   "Service provider" means a merchant who provides a service to retail customers without a written contract with the expectation that the service will be paid for by the customer upon completion of the service.[2]

2. The defendant intentionally absconded without paying for the service.

   "Intentionally absconded" means that the defendant left with the mental purpose to avoid paying for the service.[3]

3. The service provider did not consent to the defendant leaving without paying for the service.

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4. The defendant intended to deprive the service provider permanently of the full price of the service.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY THEFT OF SERVICES IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE SERVICE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[4]

Determining Value

If you find the defendant guilty, answer the following question:

("Was the value of the service more than $10,000?"

Answer: "yes" or "no.")

("Was the value of the service more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the service more than $500?"

Answer: "yes" or "no.")

["Value" means the price that the service provider stated for the service before the service was provided.][5]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the service was more than the amount stated in the question.]

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COMMENT

Wis JI-Criminal 1498C was originally published by the Committee in 2012 and revised in 2019. This revision was approved in December 2019; it adds to the comment.

The crime of "theft of services" was created by 2011 Wisconsin Act 110 [effective date: December 21, 2011]. Act 110 added subsection (1r) to § 943.50, which is now titled: "Retail theft; theft of services."

As with other retail theft violations, the basic offense is a Class A misdemeanor. The penalty increases to a felony if the value of the stolen property exceeds specified amounts. The instruction provides for a jury finding of the amount for felony cases. See footnote 4 and the accompanying text. The amount distinguishing misdemeanors from felonies was reduced from $1,500 to $500 by 2011 Wisconsin Act 174.

Act 174 also created ss. 943.50(4m) which provides that "[W]hoever violates sub. (1m) (a), (b), (c), (d), (e), or (f) is guilty of a Class I felony if all of the following apply:

(a) The value of the merchandise does not exceed $500.
(b) The person agree or combines with another to commit the violation.
(c) The person intends to sell the merchandise by means of the Internet."

In State v. Lopez, 2019 WI 101, 389 Wis.2d 156, 936 N.W.2d 125, the Wisconsin Supreme Court affirmed the court of appeals decision in State v. Lopez, 2019 WI App 2, 385 Wis.2d 482, 922 N.W.2d 855, which held that the State may charge multiple acts of retail theft as one continuous offense pursuant to § 971.36(3)(a). Nothing in § 971.36(3)(a) indicates that the legislature intended to limit the provision to a specific type or types of theft, therefore the statute is applicable to various types of theft, including retail theft under § 943.50(1m)(a) (e).

1. This statement reorders the statutory language to make it more understandable for the jury; no change in meaning is intended.

2. This is the definition provided in § 943.50(1)(am).

3. The definition of "abscond" is adapted from the one used in Wis JI-Criminal 1461, Fraud on Hotel or Restaurant Keeper. See footnote 5, Wis JI-Criminal 1461. For definition of "intentionally," see Wis JI-Criminal 923A and 923B.

4. The jury must make a finding of the value of the stolen property [or services] if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty are set forth in § 943.50(4):

- if the value of the service does not exceed $500, the offense is a Class A misdemeanor;

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- if the value of the service exceeds $500 but not $5,000, the offense is a Class I felony;
- if the value of the service exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of the service exceeds $10,000, the offense is a Class G felony.

The above reflects changes made by 2011 Wisconsin Act 174. Only the threshold for the Class I felony was changed – it was reduced to $500 from $2,500.

The questions in the instruction omit the upper limits of the categories for the felony penalties; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

5. This is the definition provided in § 943.50(1)(b)3.

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1750 PERJURY — § 946.31

Statutory Definition of the Crime

Perjury, as defined in § 946.31 of the Criminal Code of Wisconsin, is committed by one who, while under (oath) (affirmation) orally makes a false material statement which the person does not believe to be true, in any proceeding[1] before a court.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant orally made a statement while under (oath) (affirmation).[3]
2. The statement was false when made.
3. The defendant did not believe the statement to be true when made.[4]

   [It is not a defense to a prosecution under this section that testimony which constituted perjury at the time it was given was subsequently corrected or retracted.][5]
4. The statement was made in a proceeding before a court.[6]
5. The statement was material to the proceeding.

   A material statement is one which tends to prove or disprove any fact that is of consequence to the determination of the proceeding in which the statement was made.[7]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1750 was originally published in 1966 and revised in 1994, 1995, and 2004. This revision was approved in 2020. It corrected a typographical error in the Comment.

This instruction is for a violation of § 946.31, Perjury. Related offenses are covered by § 946.32, False Swearing. See Wis JI-Criminal 1754, 1755, and 1756.

The doctrine of issue preclusion does not bar the State from prosecuting a defendant for perjury allegedly committed at a criminal trial where the defendant was acquitted on a single issue, but where the State claims to have discovered new evidence that the defendant falsely testified regarding that issue. The State must show that the evidence meets the four requirements of the newly discovered evidence test. State v. Canon, 2001 WI 11, ¶¶1, 25, 241 Wis.2d 164, 622 N.W.2d 270.

Multiple counts of perjury based on statements in a single proceeding are permissible where each requires proof of a fact the other does not and each required a new "volitional departure." State v. Warren, 229 Wis.2d 172, 599 N.W.2d 379 (Ct. App. 1999).

Regarding solicitation of perjury, see State v. Manthey, 169 Wis.2d 673, 487 N.W.2d 44 (Ct. App. 1992). The court held that a solicitation of perjury charge was established where the defendant solicited another to pay money to the defendant for false testimony (referring to this as a "double inchoate crime"). 169 Wis.2d 673, 687.

The problem of perjury prosecutions of witnesses after an acquittal in a criminal case is discussed in Shellenberger, "Perjury Prosecutions After Acquittals. . . ." 71 Marquette Law Review 703 (1988).

1. Section 946.31(1) applies to statements made in "any matter, cause, action or proceeding." The instruction uses the term "proceeding" throughout based on the Committee's conclusion that it is a general term that includes the other alternatives. (See, for example, § 801.01(1) which provides: "Proceedings in the courts are divided into actions and special proceedings." Emphasis added.)

2. "Court" is selected from the list of alternatives set forth in § 946.31(1):

(a) A court;
(b) A magistrate;
(c) A judge, referee or court commissioner;
(d) An administrative agency or arbitrator authorized by statute to determine issues of fact;
(e) A notary public while taking testimony for use in an action or proceeding pending in court;

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(f) An officer authorized to conduct inquests of the dead;
(g) A grand jury;
(h) A legislative body or committee.

The instruction must be modified if an alternative other than "court" is involved. See text at notes 6 and 8, below.

See Layton School of Art & Design v. WERC, 82 Wis.2d 324, 262 N.W.2d 218 (1978), for discussion of the alternative set forth in § 946.31(1)(d): ". . . an . . . arbitrator authorized by statute to determine issues of fact."

Omitted from the instruction's definition of the offense is the statutory language: "whether legally constituted or exercising powers as if legally constituted." That phrase was added to § 946.31(1) in 1980 to replace "whether de jure or de facto." (See Chapter 110, section 58, Laws of 1979.) The previous version of this instruction included definitions of "de jure" and "de facto" and followed them with a statement that there is no reason to distinguish between the two for purposes of this offense. The same is true for the current statute's "legally constituted" phrase and therefore the Committee concluded that it is not necessary to include it in the instruction.

This interpretation is supported by State v. Petrone, 166 Wis.2d 220, 479 N.W.2d 212 (Ct. App. 1991). Petrone challenged her perjury conviction on the ground that the reserve judge who conducted the John Doe proceeding at which she made a false statement had not been properly appointed by the chief justice under § 753.075(1). The court rejected the argument, citing the statute: ". . . legally constituted or exercising powers as if legally constituted." The court held that the judge was acting with what was formerly referred to as de facto powers and therefore was covered by the statute. The court cited footnote 7 to the 1966 version of Wis JI-Criminal 1750, which, as explained above, instructed the jury that the distinction between de facto and de jure made no difference. That principle has not changed; the Committee concluded that it is not a matter that needs to be communicated to the jury. As illustrated by the Petrone case, it is a legal matter relating to the scope of the statute, not a factual question for the jury to decide.

3. "Oath" is defined to include "affirmation" in § 990.01(24). The form of the testimonial oath is described in §§ 906.03(2) and 990.01(24). Section 887.01 identifies those who may administer oaths.

Section 906.03(3) provides for taking a statement under affirmation where a person has conscientious scruples against taking an oath and sets forth the form.

4. If the defendant does not know whether the statement is true or false, it is perjury if it turns out to be false, i.e., the statute does not require that the defendant know the statement to be false.

5. This instruction should be given when warranted by the evidence. § 946.31(2).

6. See notes 1 and 2, supra.

7. This definition of "material" was cited with approval in State v. Munz, 198 Wis.2d 379, 382, 541 N.W.2d 821 (Ct. App. 1995). The court held that testimony is material if the court could have relied on it, "irrespective of whether the court ultimately relied upon the testimony in reaching its decision." 198 Wis.2d 379, 385.

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The definition of "material" is adapted from part of the definition of "relevant evidence," in § 904.01. The Judicial Council Committee's Note indicates § 904.01 is consistent with recent Wisconsin cases, including State v. Becker, 51 Wis.2d 659, 188 N.W.2d 449 (1971), which "adopted McCormick's view of the distinction between materiality and relevancy which is imported into § 904.01 by the phrase 'that is of consequence to the determination of the action.'" 59 Wis.2d R67 (1973).

Federal Rule of Evidence 404 is identical. "The rule uses the phrase 'fact that is of consequence to the determination of the action' . . .; it has the advantage of avoiding the loosely used and ambiguous word 'material.'" Federal Advisory Committee's Note, 59 Wis.2d R69.

The 1966 version of Wis JI-Criminal 1750 included the following in parentheses in the text of the instruction:

> (In a proper case, the court may instruct the jury that the statement is material, as a matter of law.)

There was no explanation that identified "a proper case" and no citation of authority for the proposition that materiality was a matter of law.

The Committee decided to delete the parenthetical sentence from the 1993 revision of the instruction because there is no direct authority in Wisconsin for having the judge, as opposed to the jury, decide whether a statement was material.

The history of the Wisconsin perjury statute shows that the 1953 Criminal Code draft eliminated "materiality" altogether. However, it was restored by the Criminal Code Advisory Committee during the 1954-55 discussions of the draft, which essentially reestablished the common law definition of the crime. During those discussions, the minutes indicate that there was a motion to add a definition of "materiality" and include a statement that "materiality is a question of law for the court." The motion failed. (See Minutes of the Criminal Code Advisory Committee, May 26, 1955, pages 2-6.)

Prior to the decision of the United States Supreme Court in United States v. Gaudin, 515 U.S. 506 (1995), the rule in the majority of federal circuits was that materiality is a matter of law for the court to decide. The statement in United States v. Watson, 623 F.2d 1198 (7th Cir. 1980), was typical:

> Although proof of a statement's materiality, . . . is an essential element of the crime charged in the indictment, it is well settled that the determination of materiality is a question of law for the court. . . . Since the issue of materiality is a legal question, not a question of fact, the government need not prove materiality beyond a reasonable doubt. . . .

The Gaudin decision rejected this view, holding that it was error for a trial court to refuse to submit the question of materiality to the jury. Gaudin was charged with violating 18 U.S.C. § 1001 by making false representations on HUD forms in connection with real estate transactions. The government conceded that the statute is violated only when the false representations go to "material facts." The court stated the basic principles that apply to resolving the question presented in this case and rejected government arguments that the basic principles should not apply:

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> The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.

515 U.S 506, 511.

The court found no basis in law or history for treating the materiality differently than other elements of other crimes. It repudiated the decision in Sinclair v. United States, 279 U.S. 263 (1929), which had held that the issue whether questions were "pertinent" under a statute penalizing the refusal to answer questions "pertinent" to a congressional inquiry was for the court, not the jury.

Gaudin, though involving a federal statute, articulated basic constitutional principles that ought to apply to analysis of the Wisconsin perjury statute. Its holding confirms the Committee's conclusion the parenthetical reference in the 1966 version of Wis JI-Criminal 1750 was insufficient authority for removing the materiality element from the jury's consideration. Wisconsin cases have been strict in refusing to approve trial court actions that arguably remove an element from the jury's consideration, even where an element involves largely a "legal" conclusion. See, for example, State v. Leist, 141 Wis.2d 34, 414 N.W. 2d 45 (Ct. App. 1987), where the court held it was error for the trial court to tell the jury that the document involved in the case was "false, sham, or frivolous." (Leist is discussed in the Comment to Wis JI-Criminal 1499.)

This conclusion is further supported by the decision in State v. Williams, 179 Wis.2d 80, 505 N.W.2d 468 (Ct. App. 1993), which involved medical assistance fraud under § 49.49(1)(a). That offense also requires "material" false statements and the court held that it was error for the trial court to deny the defendant the opportunity to introduce evidence relevant to the materiality of the statements made. "If the statements had no legal effect, the court could determine as a matter of law that the false statements were not material. At the very least, the jury should be given the opportunity to determine whether the false statements were material based upon the evidence concerning the legal effect of the statements." 179 Wis.2d 80, 87-88. Thus, if it is error to limit evidence as to "materiality," it should be error to withdraw the "materiality" issue from the jury's consideration.

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WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME III

Wisconsin Criminal Jury Instructions Committee

University of Wisconsin Law School

[Cite as Wis JI-Criminal]

• Includes Release No. 58

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* * *

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1919 SWATTING — § 947.014

Statutory Definition of the Crime

Swatting, as defined in section 947.014 of the Criminal Code of Wisconsin, is committed by one who intentionally conveys or causes to be conveyed any false information that an emergency exists, which elicited, or could elicit a response from a specialized tactical team, knowing such information to be false.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (conveyed) (caused to be conveyed) information concerning the existence of an emergency.

   "Emergency" means [Specify type of emergency as provided in 947.014(1)(b)].[1]

   "Intentionally" means that the defendant must have had the mental purpose to (convey) or (cause to be conveyed) information that an emergency exists.[2]

2. The information was false.

3. The defendant knew that the information was false. This requires only that the defendant believed that the information was false.[3]

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4. The information (elicited) (could have elicited) a response from a specialized tactical team.

A "specialized tactical team" means a special weapons and tactics team or tactical response team that is designated by a law enforcement agency and whose members are recruited, selected, trained, equipped, and assigned to resolve critical incidents that involve a threat to public safety.[4]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS H OR E FELONY AND THERE IS EVIDENCE THAT THE PENALTY-INCREASING FACT IS PRESENT[5]

[If you find the defendant guilty, you must answer the following question:

(Did the violation result in bodily harm to any person?)

(Did the violation result in great bodily harm to any person?)

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Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."]

COMMENT

Wis JI-Criminal 1919 approved by the Committee in June 2020.

This instruction is drafted for violations of § 947.014, created by 2019 Wisconsin Act 132 [effective date: March 5, 2020].

The offense is a Class I felony, unless the violation "resulted in bodily harm to any person," in which case the penalty increases to a Class H felony. If the violation "resulted great bodily harm to any person," the penalty increases to a Class E felony. § 947.014(3).

1. Section 947.014(1)(b) provides: "Emergency" means any of the following:
   1. A condition that results in or could result in the response of a law enforcement officer, tribal law enforcement officer, state-certified commission warden, fire fighter, emergency medical responder, or emergency medical services practitioner in an authorized emergency vehicle, aircraft, or vessel.
   2. A condition that jeopardizes or could jeopardize public safety and results in or could result in the evacuation of any area, building, structure, or vehicle.

2. "Intentionally" means that the actor has the mental purpose to cause the result specified or "is aware that his or her conduct is practically certain to cause that result." § 939.23(3) The "mental purpose" alternative is most likely to apply to this offense. For discussion of the "practically certain" alternative, see Wis JI-Criminal 923B.

3. Section 939.23(3) provides that when the word "intentionally" is used in a criminal statute, it requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally.'"

4. Section 947.014(1)(h).

5. The special question addresses the penalty-increasing facts that are provided in § 947.014(3). A violation resulting in bodily harm to any person is a Class H felony. An offense resulting in great bodily harm to any person is a Class E felony.

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1920 BOMB SCARES — § 947.015

Statutory Definition of the Crime

Bomb scare, as defined in section 947.015 of the Criminal Code of Wisconsin, is committed by one who intentionally conveys or causes to be conveyed any threat or false information, knowing such to be false, concerning an attempt or alleged attempt being made or to be made to destroy any property by means of explosives.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (conveyed) (caused to be conveyed) (a threat) (information) concerning an attempt or alleged attempt (being made) (to be made) to destroy any property by means of explosives.

   "Intentionally" means that the defendant must have had the mental purpose to convey or cause to be conveyed (a threat) (information) concerning an attempt or alleged attempt (being made) (to be made) to destroy property by means of explosives.[1]

   FOR CASES INVOLVING A THREAT ADD THE FOLLOWING.[2]

   [A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires

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that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in making this determination.]

2. The (threat) (information) was false.[3]

3. The defendant knew that the (threat) (information) was false. This requires only that the defendant believed that the (threat) (information) was false.[4]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1920 was originally published as Wis JI-Criminal 1905 in 1971. It was renumbered and republished without change in 1987 and revised in April 1993. The instruction was revised in 2008. This revision was approved in 2020; it added to the comment.

In State v. Van Ark, 62 Wis.2d 155, 215 N.W.2d 41 (1974), the Wisconsin Supreme Court held that a violation of § 947.015 was not a lesser included offense of what was then endangering safety by

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conduct regardless of life. The current counterpart to that offense is Recklessly Endangering Safety under § 941.30.

1. "Intentionally" means that the actor has the mental purpose to cause the result specified or "is aware that his or her conduct is practically certain to cause that result." § 939.23(3) The "mental purpose" alternative is most likely to apply to this offense. For discussion of the "practically certain" alternative, see Wis JI-Criminal 923B.

2. In State v. Robert T., 307 Wis.2d 488, 746 N.W.2d 564 (2008), the court of appeals held that "§ 947.015 must be read with the limitation that only a false bomb scare that constitutes a 'true threat' can be charged." ¶12. The definition of "threat" in the instruction is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. State v. Robert T. cited Perkins with approval. The Committee concluded that the term "true threat" is a constitutional term of art that need not be communicated to the jury in a situation like the one covered by this instruction where it could be especially confusing given the requirement that the threat be false.

Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

3. Although the statute does not specify that the threat be "false," the Committee is satisfied this is implied by the next clause referring to the actor to "knowing such to be false."

This conclusion is bolstered by the decision in State v. Van Ark, supra. In concluding that a violation of § 947.015 was not a lesser included offense of what was then called endangering safety by conduct regardless of life, the court identified the elements of § 947.015 as follows:

> It is apparent from a comparison of the two statutes that sec. 947.015, Stats., is not an included crime in sec. 941.30 because it does require proof of additional facts, namely, the conveyance of a false bomb threat and knowledge that it is false. The state would be required to prove under sec. 941.30 that the "bomb" was imminently dangerous and under sec. 947.015 that the "bomb" was false or inoperable.

62 Wis.2d 155, 164

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4. Section 939.23(3) provides that when the word "intentionally" is used in a criminal statute, it requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally.'"

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2104 SECOND DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS — § 948.02(2)

Statutory Definition of the Crime

Second degree sexual assault of a child, as defined in § 948.02(2) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with a person who has not attained the age of 16 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).

2. (Name of victim) was under the age of 16 years at the time of the alleged sexual [contact] [intercourse].

Knowledge of (name of victim)'s age is not required[1] and mistake regarding (name of victim)'s age is not a defense.[2]

Consent to sexual [contact] [intercourse] is not a defense.[3]

Meaning of [Sexual Contact] [Sexual Intercourse]

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1989 as Wis JI-Criminal 2104 [for sexual intercourse offenses] and Wis JI-Criminal 2105 [for sexual contact offense]. It was revised in 1996 to combine the instructions as Wis JI-Criminal 2104. The 2001 revision adopted a new format, made nonsubstantive changes to the text, and updated the Comment. The 2008 revision added a reference to 2007 Wisconsin Act 80 to the Comment. The 2018 revision reflected a change made by 2017 Wisconsin Act 174. This revision was approved by the Committee in June 2020; it corrected an inadvertent error in the statutory citation.

Section 948.02(2) was amended by 2017 Wisconsin Act 174 [effective date: March 30, 2018] to add the following: "This section does not apply if s. 948.093 applies." Section 948.093, Underage sexual activity, applies to sexual activity by a defendant who has not attained the age of 19. The Committee concluded that any factual discrepancies regarding the applicability of § 948.093 would likely be resolved before trial and in any event should be treated in the same manner as statutory exceptions. The Committee's judgment has been that statutory exceptions are best addressed as follows. The question whether an exception applies is not an issue in the case until there is some evidence of that fact. Once there is evidence sufficient to raise that issue, the burden is on the state to prove beyond a reasonable doubt that the exception does not apply. See the Comment to Wis JI-Criminal 1335B explaining the application of this approach to exceptions to the prohibition on carrying a concealed weapon.

This instruction is for two of the types of second degree sexual assault of a child defined by § 948.02(2): sexual contact or sexual intercourse with a person who has not attained the age of 16 years.

2008 Wisconsin Act 80 made significant changes in subsection (1) of § 948.02(2). Subsection (2) was not affected.

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a "crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged" is a lesser included crime.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

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Second degree sexual assault of a child under § 948.02(2) is a lesser included offense of first degree sexual assault of a child under § 948.02(1) and is properly submitted when the evidence supports a reasonable doubt about the child's age. State v. Moua, 215 Wis.2d 511, 573 N.W.2d 2020 (Ct. App. 1997).

Prohibiting consensual sexual activity with a person under the age of 16 does not violate an adult defendant's alleged "constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation." State v. Fisher, 211 Wis.2d 665, 668, 565 N.W.2d 565 (Ct. App. 1997).

1. See § 939.23(6).

2. See § 939.43(2).

In State v. Jadowski, 2004 WI 68, 272 Wis.2d 418, 680 N.W.2d 810, the court held that "no affirmative defense of the victim's intentional misrepresentation of his or her age exists in a prosecution under § 948.02(2). . . . If an accused's reasonable belief about the victim's age, based on the victim's intentional misrepresentation of age, is not a defense, then neither evidence regarding the defendant's belief about the victim's ages nor evidence regarding the cause for or reasonableness of that is relevant." ¶3.

3. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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2120 SEXUAL EXPLOITATION OF A CHILD — § 948.05(1)(a)

[USE THIS INSTRUCTION IF THERE IS NO EVIDENCE OF THE DEFENSE UNDER § 948.05(3).][1]

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1)(a) of the Criminal Code of Wisconsin, is committed by one who employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording[2] or displaying in any way the conduct, with knowledge of the character and content of the sexually explicit conduct involving the child.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (employed) (used) (persuaded) (induced) (enticed) (coerced) (name of child) to engage in sexually explicit conduct.[4]

   [Consent by (name of child) is not a defense.][5]

2. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][6]

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3. The defendant acted for the purpose of (recording) (displaying in any way) the sexually explicit conduct.

["Record" means to reproduce an image or a sound or to store data representing an image or a sound.][7]

4. The defendant knew that the person in the (recording) (display) was engaged in sexually explicit conduct.[8]

Meaning of "Sexually Explicit Conduct"

"Sexually explicit conduct" means[9] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[11]

If you find the defendant guilty, you must answer the following question:

Had the defendant attained the age of 18 years at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

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COMMENT

Wis JI-Criminal 2120 was approved by the Committee in June 2010. This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

NOTE: The instruction previously designated as Wis JI-Criminal 2120 was renumbered Wis JI-Criminal 2121 in 2010.

This instruction is for violations of sub. (1)(a) of § 948.05 where there is no evidence of the affirmative defense defined in sub. (3). Section 948.05 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. Section 948.05 was based on § 940.203, 1987 Wis. Stats., for which there had been no published instruction.

Subsection (2) of § 948.05 extends liability to a person responsible for the welfare of a child who "knowingly permits, allows or encourages the child" to engage in conduct prohibited by sub. (1). See Wis JI-Criminal 2123.

Section 948.05 was amended by 1999 Wisconsin Act 3, effective date: May 13, 1999. The act recreated what was sub. (1)(c) as new sub. (1m); see Wis JI-Criminal 2122. Act 3 also amended the affirmative defense provided in sub. (3), which can apply to violations addressed by this instruction. For cases involving the affirmative defense, see Wis JI-Criminal 2120A.

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by providing a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations of § 948.05.

1. Wis JI-Criminal 2120A provides instruction for violations of § 948.05(1)(a) where there is evidence of the defense provided in § 948.05(3). The defense applies if the defendant is reasonably mistaken about the age of the child.

2. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

3. The statement of the facts necessary to constitute the crime is derived by combining the definition of the offense found in sub. (1)(a) of § 948.05 with the introductory statement in that portion of § 948.05(1) which precedes sub. (a).

4. If the name of the child is not known, substitute "the person" wherever the instruction calls for "(name of child)."

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5. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

6. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2). However, sub. (3) of § 948.05 provides an affirmative defense if the defendant is reasonably mistaken about the age. Do not use this statement where there is evidence of the defense. Instead, use Wis JI-Criminal 2120A.

7. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

8. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the person in the recording was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

9. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

(7) "Sexually explicit conduct" means actual or simulated:
- (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
- (b) Bestiality;
- (c) Masturbation;
- (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
- (e) Lewd exhibition of intimate parts.

10. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

> "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually

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explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

11. 2005 Wisconsin Act 433 [effective date: June 6, 2006] changed the penalty structure for violations of sec. 948.05: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by providing a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

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2120A SEXUAL EXPLOITATION OF A CHILD: AFFIRMATIVE DEFENSE — § 948.05(1)(a)

[USE THIS INSTRUCTION IF THERE IS EVIDENCE OF THE DEFENSE UNDER § 948.05(3).][1]

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1)(a) of the Criminal Code of Wisconsin, is committed by one who employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording[2] or displaying in any way the conduct, with knowledge of the character and content of the sexually explicit conduct involving the child.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (employed) (used) (persuaded) (induced) (enticed) (coerced) (name of child) to engage in sexually explicit conduct.[4]

   [Consent by (name of child) is not a defense.][5]

2. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][6]

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3. The defendant acted for the purpose of (recording) (displaying in any way) the sexually explicit conduct.

["Record" means to reproduce an image or a sound or to store data representing an image or a sound.][7]

4. The defendant knew that the person in the (recording) (display) was engaged in sexually explicit conduct.[8]

"Sexually explicit conduct" means[9] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).[10]

Consider Whether the Defense is Proved

Wisconsin law provides that it is a defense to this crime if the defendant had reasonable cause to believe that (name of child) had attained the age of 18 years.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that this defense is established.[11]

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.

Jury's Decision

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

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If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you must find the defendant not guilty.[12]

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[13]

If you find the defendant guilty, you must answer the following question:

Had the defendant attained the age of 18 years at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2120A was approved by the Committee in June 2010. This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

NOTE: The instruction previously designated as Wis JI-Criminal 2120A was renumbered JI 2121A in 2010.

This instruction is for a case involving a violation of sub. (1)(a) of § 948.05 where there is evidence of the affirmative defense defined in sub. (3) of the same statute. See Wis JI-Criminal 2120 for an instruction intended to be used where there is no evidence of the affirmative defense. See the Comment to that instruction for general information about the statute.

The definition of the affirmative defense in § 948.05(3) was amended by 1999 Wisconsin Act 3; effective date: May 13, 1999. The defense was limited to violations of subs. (1)(a), (1)(b), and (2) and requirements that the defendant's reasonable belief be supported by some sort of documentary proof of age exhibited by the child were deleted. The defense now requires only that "the defendant had reasonable cause to believe that the child had attained the age of 18 years."

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The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

Subsection (2) of § 948.05 extends liability to a person responsible for the welfare of a child who "knowingly permits, allows or encourages the child" to engage in conduct prohibited by sub. (1). See Wis JI-Criminal 2123.

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by providing a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations § 948.05.

1. Wis JI-Criminal 2120A provides instruction for violations of § 948.05(1)(a) where there is evidence of the defense provided in § 948.05(3). The defense applies if the defendant is reasonably mistaken about the age of the child. The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

2. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

3. The statement of the facts necessary to constitute the crime is derived by combining the definition of the offense found in sub. (1)(a) of § 948.05 with the introductory statement in that portion of § 948.05(1) which precedes sub. (a).

4. If the name of the child is not known, substitute "the person" wherever the instruction calls for "(name of child)."

5. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

6. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2). However, sub. (3) of § 948.05 provides an affirmative defense if the defendant is reasonably mistaken about the age. Do not use this statement where there is evidence of the defense. Instead, use Wis JI-Criminal 2120A.

7. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

8. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the person in the recording was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

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9. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

(7) "Sexually explicit conduct" means actual or simulated:
(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts.

10. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

11. The statute provides that the defendant "has the burden of proving this defense by a preponderance of the evidence." The statement used in the instruction is the description typically used to explain the civil burden of persuasion.

12. This statement is included to assure that both options for a not guilty verdict are clearly presented:

(1) not guilty because the elements are not proven [regardless of the conclusion about the defense]; and

(2) not guilty even though the elements are proven, because the defense has been established.

13. Section 948.05 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age

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of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of sexual exploitation of a child, under sec. 948.05(1)(b), at the time and place charged in the information.
>
> We, the jury find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2121 SEXUAL EXPLOITATION OF A CHILD — § 948.05(1)(b)

[USE THIS INSTRUCTION IF THERE IS NO EVIDENCE OF THE DEFENSE UNDER § 948.05(3).][1]

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1)(b) of the Criminal Code of Wisconsin, is committed by one who records[2] or displays in any way a child engaged in sexually explicit conduct with knowledge of the character and content of the sexually explicit conduct involving the child.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (recorded) (displayed in any way) (name of child).[4]

   "Record" means to reproduce an image or a sound or to store data representing an image or a sound.[5]

   [Consent by (name of child) is not a defense.][6]

2. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][7]

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3. The defendant (recorded) (displayed in any way) (name of child) while (name of child) was engaged in sexually explicit conduct.

"Sexually explicit conduct" means[8] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).[9]

4. The defendant knew that the person in the (recording) (display) was engaged in sexually explicit conduct.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[11]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

This instruction was originally published as Wis JI-Criminal 2120 in 1995 and revised in 2000, 2001, 2003, 2004, 2007, and 2010. The 2010 revision renumbered the instruction as Wis JI-Criminal 2121.

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This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

This instruction is for violations of sub. (1)(b) of § 948.05 where there is no evidence of the affirmative defense defined in sub. (3). Section 948.05 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. Section 948.05 was based on § 940.203, 1987 Wis. Stats., for which there had been no published instruction.

Subsection (2) of § 948.05 extends liability to a person responsible for the welfare of a child who "knowingly permits, allows or encourages the child" to engage in conduct prohibited by sub. (1). See Wis JI-Criminal 2123.

Section 948.05 was amended by 1999 Wisconsin Act 3, effective date: May 13, 1999. The act recreated what was sub. (1)(c) as new sub. (1m); see Wis JI-Criminal 2122. Act 3 also amended the affirmative defense provided in sub. (3), which can apply to violations addressed by this instruction. For cases involving the affirmative defense, see Wis JI-Criminal 2121A.

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations of § 948.05.

1. Wis JI-Criminal 2121A provides instruction for violations of § 948.05(1)(b) where there is evidence of the defense provided in § 948.05(3). The defense applies if the defendant is reasonably mistaken about the age of the child.

2. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

3. The statement of the facts necessary to constitute the crime is derived by combining the definition of the offense found in sub. (1)(b) of § 948.05 with the introductory statement in that portion of § 948.05(1) which precedes sub. (a).

4. If the name of the child is not known, substitute "the person" wherever the instruction calls for "(name of child)."

5. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

6. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

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7. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2). However, sub. (3) of § 948.05 provides an affirmative defense if the defendant is reasonably mistaken about the age. Do not use this statement where there is evidence of the defense. Instead, use Wis JI-Criminal 2121A.

8. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

(7) "Sexually explicit conduct" means actual or simulated:
- (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
- (b) Bestiality;
- (c) Masturbation;
- (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
- (e) Lewd exhibition of intimate parts.

9. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

> "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

10. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the person in the photograph was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

11. Section 948.05 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

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As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of sexual exploitation of a child, under sec. 948.05(1)(b), at the time and place charged in the information.
>
> We, the jury find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2121A SEXUAL EXPLOITATION OF A CHILD: AFFIRMATIVE DEFENSE — § 948.05(1)(b)

[USE THIS INSTRUCTION IF THERE IS EVIDENCE OF THE DEFENSE UNDER § 948.05(3).][1]

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1)(b) of the Criminal Code of Wisconsin, is committed by one who records[2] or displays in any way a child engaged in sexually explicit conduct with knowledge of the character and content of the sexually explicit conduct involving the child.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (recorded) (displayed in any way) (name of child).[4]

   "Record" means to reproduce an image or a sound or to store data representing an image or a sound.[5]

   [Consent by (name of child) is not a defense.][6]

2. (Name of child) had not attained the age of 18 years.

3. The defendant (recorded) (displayed in any way) (name of child) while (name of child) was engaged in sexually explicit conduct.

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"Sexually explicit conduct" means[7] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate parts)).[8]

4. The defendant knew that the person in the (recording) (display) was engaged in sexually explicit conduct.[9]

Consider Whether the Defense is Proved

Wisconsin law provides that it is a defense to this crime if the defendant had reasonable cause to believe that (name of child) had attained the age of 18 years.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that this defense is established.[10]

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.

Jury's Decision

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

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If you are not satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you must find the defendant not guilty.[11]

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[12]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

This instruction was originally published as Wis JI-Criminal 2120A in 2000 and revised in 2001, 2003, 2004, 2007, 2008, and 2010. The 2010 revision renumbered the instruction Wis JI-Criminal 2121A. This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

This instruction is for a case involving a violation of sub. (1)(b) of § 948.05 where there is evidence of the defense provided in sub. (3) of the same statute. See Wis JI-Criminal 2121 for an instruction intended to be used where there is no evidence of the affirmative defense. See the Comment to that instruction for general information about the statute.

The definition of the affirmative defense in § 948.05(3) was amended by 1999 Wisconsin Act 3; effective date: May 13, 1999. The defense was limited to violations of subs. (1)(a), (1)(b), and (2) and requirements that the defendant's reasonable belief be supported by some sort of documentary proof of age exhibited by the child were deleted. The defense now requires only that "the defendant had reasonable cause to believe that the child had attained the age of 18 years."

The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

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NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations of § 948.05.

1. This instruction is intended to be used for cases involving violations of § 948.05(1)(b) where there is evidence of the defense provided in § 948.05(3). The defense applies if the defendant "had reasonable cause to believe that the child had attained the age of 18 years." The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

2. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

3. The statement of the facts necessary to constitute the crime is derived by combining the definition of the offense found in sub. (1)(b) of § 948.05 with the introductory statement in that portion of § 948.05(1) which precedes sub. (a).

4. If the name of the child is not known, substitute "the person" wherever the instruction calls for "(name of child)."

5. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

6. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

7. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

(7) "Sexually explicit conduct" means actual or simulated:
- (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
- (b) Bestiality;
- (c) Masturbation;
- (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
- (e) Lewd exhibition of intimate parts.

8. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

> "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

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The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

9. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the child in the photograph was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

10. The statute provides that the defendant "has the burden of proving this defense by a preponderance of the evidence." The statement used in the instruction is the description typically used to explain the civil burden of persuasion.

11. This statement is included to assure that both options for a not guilty verdict are clearly presented:

(1) not guilty because the elements are not proven [regardless of the conclusion about the defense]; and

(2) not guilty even though the elements are proven, because the defense has been established.

12. Section 948.05 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of sexual exploitation of a child, under sec. 948.05(1)(b), at the time and place charged in the information.
>
> We, the jury find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2122 SEXUAL EXPLOITATION OF A CHILD — § 948.05(1m)

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1m) of the Criminal Code of Wisconsin, is committed by one who distributes[1] any recording[2] of a child engaged in sexually explicit conduct, knows the character and content of the sexually explicit conduct involving the child and knows or reasonably should know that the child engaged in the sexually explicit conduct has not attained the age of 18 years.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant distributed a recording of [a child] [(name of child)][4] engaged in sexually explicit conduct.

   "Recording" means a reproduction of an image or a sound or the storage of data representing an image or a sound.[5]

   "Sexually explicit conduct" means[6] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate parts)).[7]

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2. The defendant knew that [the person] [(name of child)] in the recording was engaged in sexually explicit conduct.[8]

   [Consent by (name of child) is not a defense.][9]

3. [The person] [(Name of child)] had not attained the age of 18 years.

4. The defendant knew or reasonably should have known that [the person] [(name of child)] had not attained the age of 18 years.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[11]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2122 was originally published in 2000 and revised in 2001, 2003, 2004, and 2007. The 2007 revision involved adding a special question at the end of the instruction. This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

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This instruction is for a violation of sub. (1m) of § 948.05, which was created as sub. (1)(c) by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. Section 948.05 was based on § 940.203, 1987 Wis. Stats., for which there had been no published instruction.

The statute was amended by 1999 Wisconsin Act 3, effective date: May 13, 1999. That amendment renumbered sub. (1)(c) as sub. (1m) and added a mental element relating to the child's age. The latter change was intended to remedy the constitutional defect noted in State v. Zarnke, 224 Wis.2d 116, 589 N.W.2d 370 (1999). See note 10, below.

Subsection (2) of § 948.05 extends liability to a person responsible for the welfare of a child who "knowingly permits, allows or encourages the child" to engage in conduct prohibited by sub. (1)(a) or (b) or (1m).

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations of § 948.05.

1. "Distributes" refers to just one of the activities proscribed by § 948.05(1m) and was selected for use in the instruction because it appears to be an alternative likely to be used. The other alternatives are: produces; performs in; profits from; promotes; imports into the state; reproduces; advertises; sells; or, possesses with intent to sell or distribute. For cases involving one of those alternatives, the applicable term would, of course, have to be substituted for "distributes" throughout the instruction.

2. This reflects the change made in § 948.05(1m) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to "any undeveloped film, photographic negative, motion picture, videotape, sound recording, or other reproduction . . ."

3. The requirement that the defendant knew or reasonably should have known the age of the child was added to the statute by 1999 Wisconsin Act 3, effective date: May 13, 1999. The change was intended to remedy the constitutional defect noted in State v. Zarnke, 224 Wis.2d 116, 589 N.W.2d 370, (1999). See note 10, below.

4. One of the alternatives should be selected: using the name of the child if known, or just referring to "a child" if the name of the child is not known.

5. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

6. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

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(7) "Sexually explicit conduct" means actual or simulated:

(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;

(b) Bestiality;

(c) Masturbation;

(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or

(e) Lewd exhibition of intimate parts.

7. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

> "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

8. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the child in the photograph was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

9. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

10. The knowledge element was extended to the age of the child by 1999 Wisconsin Act 3, effective date: May 13, 1999. The change was intended to remedy the constitutional defect noted in State v. Zarnke, 224 Wis.2d 116, 589 N.W.2d 370 (1999) [reversing 215 Wis.2d 71, 572 N.W.2d 491 (Ct. App. 1997)]. The defendant in Zarnke was charged with distributing pictures of children engaged in sexually explicit conduct in violation of sub. (1)(c) of § 948.05, 1997-98 Wis. Stats. In rejecting Zarnke's constitutional challenges to the statute, the court of appeals interpreted it to require the state to prove the defendant's knowledge of the child being under age. The court concluded that the legislature did not intend to treat the knowledge issue as an affirmative defense "where the illegal conduct occurs outside of the child's presence." 215 Wis.2d 71, 82-83.

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The supreme court held that sub. (1)(c) of § 948.05 was "unconstitutional as it applies to the distribution of sexually explicit material depicting minors, as well as to the other prohibited conduct which does not entail a personal interaction between the accused and the child-victim." 224 Wis.2d 116, 124. The defect is the statute's "failing to require that the State prove that a distributor of sexually explicit materials had knowledge of the minority of person(s) depicted in the materials." 224 Wis.2d 116, 120-21. Act 3 renumbered sub. (1)(c) to sub. (1m) and revised it to include an element requiring that the defendant knew, or reasonably should have known, the age of the child. It also revised the affirmative defense provision in § 948.05(3) so that it does not apply to violations of sub. (1m).

11. Section 948.05 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of sexual exploitation of a child, under sec. 948.05(1m), at the time and place charged in the information.
>
> We, the jury find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2123 SEXUAL EXPLOITATION OF A CHILD: BY A PERSON RESPONSIBLE FOR THE CHILD'S WELFARE — § 948.05(2)

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(2) of the Criminal Code of Wisconsin, is committed by a person responsible for the welfare of a child who knowingly permits, allows, or encourages the child to engage in sexually explicit conduct for the purpose of recording[1] or displaying it in any way.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a person responsible for the welfare of a child, (name of victim).

   A "person responsible for the welfare of a child" includes (use the appropriate term from § 948.01(3)).[2]

2. The defendant knowingly permitted, allowed, or encouraged (name of victim) to engage in sexually explicit conduct.

   "Sexually explicit conduct" means[3] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).[4]

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3. The defendant intended that the sexually explicit conduct be recorded or displayed in any way.[5]

["Record" means to reproduce an image or a sound or to store data representing an image or a sound.][6]

4. (Name of child) had not attained the age of 18 years.[7]

[Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][8]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2123 was approved by the Committee in June 2007. This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

This instruction is for violations of sub. (2) of § 948.05 which applies only to "a person responsible for a child's welfare." Violations of sub. (1)(b) are addressed by Wis JI-Criminal 2120 and 2120A; violations of sub. (1m) are addressed by Wis JI-Criminal 2122.

Subsection (3) of § 948.05 provides that it is an affirmative defense if a defendant "has reasonable cause to believe that the child ha d attained the age of 18 years." It may be unlikely that the defense

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would apply to violations of sub. (2), where the defendant must be a person responsible for the child's welfare. If the defense does apply, see Wis JI-Criminal 2120A for a model that could be adapted for use for violations of sub. (2).

1. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

2. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

A biological father, who has admitted paternity in writing, is a "parent" and thus a "person responsible for the child's welfare" under § 948.21. State v. Evans, 171 Wis.2d 471, 391 N.W.2d 141 (1992).

See the Comment to Wis JI-Criminal 2114 for discussion of case law interpreting this term.

3. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

(7) "Sexually explicit conduct" means actual or simulated:
- (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
- (b) Bestiality;
- (c) Masturbation;
- (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
- (e) Lewd exhibition of intimate parts.

4. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

> "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats.

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The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

5. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

The statute requires that the defendant "knowingly permit, allow or encourage the child to engage in sexually explicit conduct for a purpose proscribed in sub. (1)(a) or(b) or (1m) . . ." In the Committee's judgment, the "purpose proscribed" in the cross-referenced sections boil down to "recording or displaying" sexually explicit conduct. The element uses the more direct requirement that the defendant "intend" that the conduct be recorded or displayed as the equivalent of permitting, allowing or encouraging for that purpose. No change of meaning is intended.

6. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

7. See s. 948.01(1).

8. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2). However, sub. (3) of § 948.05 provides an affirmative defense if the defendant is reasonably mistaken about the age. Do <u>not</u> use this statement where there is evidence of the defense. Instead, see Wis JI-Criminal 2120A for a model that could be adapted for use for violations of sub. (2).

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2125 CAUSING A CHILD TO VIEW OR LISTEN TO SEXUAL ACTIVITY — § 948.055

Statutory Definition of the Crime

Section 948.055 of the Criminal Code of Wisconsin is violated by a person who intentionally causes [a child] [an individual who the actor believes or has reason to believe has not attained 18 years of age] to view or listen to sexually explicit conduct for the purpose of sexually arousing or gratifying the person or humiliating or degrading the child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused [(name of child)] [an individual who the actor believes or has reason to believe has not attained 18 years of age][1] to view or listen to sexually explicit conduct.

   "Sexually explicit conduct"[2] means actual or simulated [sexual intercourse] [bestiality] [masturbation] [sexual sadism or sexual masochistic abuse] [lewd exhibition of (name intimate part)].[3]

   Consent by [(name of child)] [the individual] is not a defense.

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2. The defendant intentionally caused [(name of child)] [an individual who the actor believes or has reason to believe has not attained 18 years of age] to view or listen to sexually explicit conduct.

"Intentionally" requires that the defendant acted with the purpose to cause [(name of child)] [the individual] to view or listen to sexually explicit conduct.[4]

[SELECT THE THIRD ELEMENT THAT FITS THE FACTS OF THE CASE.]

[3. (Name of child) had not attained the age of (13) (18) years.[5]

Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.[6]]

[3. The defendant believed or had reason to believe that the individual had not attained the age of (13) (18) years.[7]]

4. The defendant acted with the purpose of sexually arousing or gratifying the defendant or humiliating or degrading [(name of child)] [an individual who the actor believes or has reason to believe has not attained 18 years of age].

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

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If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2125 was originally published in 1996 and was revised in 2004 and 2011. The 2011 revision reflected changes made by 2011 Wisconsin Act 284. This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

Section 948.055 was originally enacted as § 940.227 by 1987 Wisconsin Act 334. It was renumbered § 948.055 by 1993 Wisconsin Act 218 and amended by 1995 Wisconsin Act 67.

The 1995 amendment made three changes in the text of § 948.055:

1) deleted the requirement that the defendant act "by use or threat of force or violence," replacing it with "intentionally";

2) added "or listen to"; and,

3) added "if the viewing or listening is for the purpose of sexually arousing or gratifying the actor or humiliating or degrading the child."

The statute was amended by 2011 Wisconsin Act 284 [effective date: April 27, 2012] to extend its coverage to situations where "the actor believes or has reason to believe [the individual] has not attained 18 years of age." Act 284 also created § 939.32(1)(cr) to read: "Whoever attempts to commit a crime under s. 948.055(1) is subject to the penalty for the completed act, as provided in s. 948.055(2)."

Violations of § 948.055 are punished as a Class F felony if the child has not attained the age of 13 years [or if the defendant believes or has reason to believe the person has not attained the age of 13 years] and as a Class H felony if the child has not attained the age of 18 years [or if the defendant believes or has reason to believe the person has not attained the age of 18 years]. See § 948.055(2). The Committee recommends inserting the appropriate age limit as part of the third element.

1. 2011 Wisconsin Act 284 amended § 948.055 to apply to causing "an individual who the actor believes or has reason to believe has not attained 18 years of age" to view or listen to sexually explicit conduct, in addition to causing a child to do the same. This is apparently intended to address the "internet sting" situation, where the actor believes he or she is communicating with a child but the supposed child is in fact a government investigator. For cases involving this situation, the Committee recommends using the entire phrase "an individual who the actor believes or has reason to believe has not attained 18 years of age" where the name of the child would otherwise be used.

2. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7).

3. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in § 948.01(7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

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"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area. . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

4. The instruction uses the common "mental purpose" definition of intent. Intent is also present where a defendant "is practically certain that his or her conduct" will have the prohibited result. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

5. Violations of this statute are punished as a Class F felony if the child has not attained the age of 13 years and as a Class H felony if the child has not attained the age of 18 years. The Committee recommends inserting the appropriate age limit as part of the third element.

6. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2).

7. This is the alternative added to the statute by 2011 Wisconsin Act 284. Violations of this statute are punished as a Class F felony if the defendant believes or has reason to believe the individual has not attained the age of 13 years and as a Class H felony if the defendant believes or has reason to believe the individual has not attained the age of 18 years. The Committee recommends inserting the appropriate age limit as part of the third element.

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2146A CHILD PORNOGRAPHY: POSSESSION OF OR ACCESSING A RECORDING — § 948.12(1m)

Statutory Definition of the Crime

Possession of child pornography, as defined in § 948.12(1m) of the Criminal Code of Wisconsin, is committed by one who knowingly possesses[1] or accesses in any way with intent to view any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct, knows or reasonably should know that the recording contained depictions of sexually explicit conduct, and knows or reasonably should know that the child depicted in the material has not attained the age of 18 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly (possessed a recording) (accessed a recording in any way with intent to view it).[2]

   ["Possessed" means that the defendant knowingly[3] had actual physical control of the recording.][4]

   ADD THE FOLLOWING PARAGRAPHS IN POSSESSION CASES WHEN THEY ARE SUPPORTED BY THE EVIDENCE:

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[A recording is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the recording.]

[It is not required that a person own a recording in order to possess it. What is required is that the person exercise control over the recording.]

[Possession may be shared with another person. If a person exercises control over a recording, the recording is in that person's possession, even though another person may also have similar control.]

"Recording" means a reproduction of an image or a sound or the storage of data representing an image or a sound.[5]

2. The recording showed a child engaged in sexually explicit conduct.

A child is a person who is under the age of 18 years.[6]

"Sexually explicit conduct" means[7] actual or simulated [sexual intercourse] [bestiality] [masturbation] [sexual sadism or sexual masochistic abuse] [lewd exhibition of (name intimate part)].[8]

3. The defendant knew or reasonably should have known that the recording contained depictions of a person engaged in actual or simulated _____.[9]

4. The defendant knew or reasonably should have known[10] that the person [shown in the recording] [depicted in the material] engaged in sexually explicit conduct was under the age of 18 years.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS D FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[11]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

This instruction was originally published as Wis JI-Criminal 2146 in 1992 and revised in 1998, 2002, 2003, 2006, 2007, and 2011, and 2012. The 2002 revision involved renumbering as Wis JI-Criminal 2146A, adopting a new format, and updating the instruction to reflect changes made in the statute by 2001 Wisconsin Act 16. The 2006 revision added a definition of "possession" to element 1. The February 2007 revision involved adding a special question at the end of the instruction and updating the Comment. The 2011 revision added to footnote 4. The 2012 revision reflected changes made by 2011 Wisconsin Acts 271 and 272. This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

This instruction is for a violation of § 948.12(1m), as amended by 2011 Wisconsin Act 271, effective date: April 24, 2012. For a violation of § 948.12(2m), created by 2001 Wisconsin Act 16, see Wis JI-Criminal 2146B.

The United States Supreme Court upheld the constitutionality of a New York statute prohibiting persons from distributing child pornography in New York v. Ferber, 458 U.S. 747 (1982). The statute before the court differed from § 948.12, but some of the decision's discussion of constitutional issues implicated by prohibiting child pornography may be relevant to questions arising under the Wisconsin statute.

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In State v. Whistleman, 2001 WI App 189, 247 Wis.2d 337, 633 N.W.2d 249, the court held that "pictorial reproductions" as used in § 948.12, 1999-2000 Wis. Stats., included computer disks that store images of child pornography. 2001 Wisconsin Act 16 amended § 948.12 by replacing "pictorial reproduction" with "recording," defining the latter in § 948.01(3r) to include "storage of data representing an image. . ."

In State v. Multaler, 2002 WI 35, 252 Wis.2d 54, 643 N.W.2d 437, the court held that charging a separate count under § 948.12, 1997-98 Wis. Stats., for each of 28 files containing pornographic images on two computer diskettes did not violate the rule prohibiting multiplicitous charges. Also see State v. Schaefer, 2003 WI App 164, 266 Wis.2d 719, 668 N.W.2d 760.

Section 948.12 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a minimum sentence of 3 years for violations of § 948.12. Section 939.617 was amended by 2011 Wisconsin Act 272 [effective date: April 24, 2012] to limit the exception to the minimum sentence for violations of § 948.12 to those where the defendant "is no more than 48 months older than the child who engaged in the sexually explicit conduct." See § 939.617(2)(b).

1. Section 948.12(1m)(a) requires that "the person knows that he or she possesses the material." Rather than state this as a separate element, the Committee concluded it was clearer to use the phrase "knowing possession."

2. Section 948.12(1m) was amended by 2011 Wisconsin Act 271 [effective date: April 24, 2012] to add "or accesses in any way with intent to view" as an alternative to possession. This change may address some of the difficulties presented by trying to apply "possession" to certain fact situations. See footnote 4, below, and State v. Mercer, cited therein.

The statute prohibits possession or accessing of undeveloped film, a photographic negative, a photograph, a motion picture, a videotape, or a recording. The statute was revised by 2001 Wisconsin Act 16 [effective date: September 1, 2001] to delete reference to "pictorial reproduction" and "audio recording" and replace them with "recording." "Recording" is defined in § 948.01(3r) as follows: "'Recording' includes the creation of a reproduction of an image or a sound or the storage of data representing an image or a sound." The Committee concluded that the new term "recording" is defined to include all the specific items listed in the statute. That is, undeveloped film, or a photographic negative, or a photograph, etc., is a "recording" as that term is defined in § 948.01(3r). The Committee further concluded that it is permissible to instruct the jury that, for example, "A photographic negative is a recording." This applies only to items listed in the statute; whether other items qualify as a "recording" is a factual issue for the jury to resolve.

3. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414-18, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 394, 508-09, 451 N.W.2d 752 (1990).

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4. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the item is arguably under the defendant's control but not directly in the physical possession of the defendant.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

Questions about "knowing possession" and "control" of a recording arise in cases involving images on a computer hard drive. In State v. Lindgren, 2004 WI App 159, 275 Wis.2d 851, N.W.2d, the court of appeals found that the evidence was sufficient to show "possession" where images were "cached" on the hard drive and there was evidence that the defendant knew that would happen when he accessed pornographic material. Lindgren adopted the rationale of U.S. v. Tucker, 305 F.3d. 1193 (10th Cir. 2002).

In State v. Mercer, 2010 WI App 47, 324 Wis.2d 506, 782 N.W.2d 125, the court held that possession of images of child pornography in violation of § 948.12(1m) can be proved by evidence from computer monitoring software showing that the defendant searched for and obtained access to web sites and viewed the images. It is not required that the defendant retained control of the images after viewing them by, for example, storing them on the computer or allowing them to remain in the computer's cache. The court's conclusion:

> . . . an individual knowingly possesses child pornography when he or she affirmatively pulls up images of child pornography on the Internet and views those images knowing that they contain child pornography. Whether the proof is hard drive evidence or something else, such as the monitoring software here, should not matter because both capture a "videotape" of the same behavior. And images in either place can be controlled by taking actions like printing or copying the images. ¶31.

The trial court in the Mercer case had added to the standard definition of "possession" in the instruction, giving examples of what could constitute possession:

> [p]ossessed means that the defendant knowingly had actual physical control of the recording, or that the recording is in an area over which the person has control and the person intends to exercise control over the recording.
>
> In cases involving digital images, if you are satisfied that the defendant intentionally visited child pornography websites when [sic] contained child pornography images; and (a) acted on or manipulated the child pornography image; or (b) viewed the child pornography image knowing that his web browser automatically saved the image in the temporary Internet cache file; you may find knowing possession of such images.
>
> It is not required that a person own a recording in order to possess it. What is required is that the person exercise control over the recording. Recording means a reproduction of an image or a sound or the storage of data representing an image or a sound, including a digital image.

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The court of appeals commented that this instruction "actually inured to Mercer's benefit because it gave an example fitting his theory of defense, a defense to which he was not entitled." ¶36.

For two articles providing helpful information about basic computer functioning and analysis of the "possession" of material viewed via computer see: Ty E. Howard, Don't Cache Out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files, 19 Berkeley Tech. L.J. 1227, 1267-68 (2004); Giannina Marin, Possesson of Child Pornography: Should You Be Convicted When the Computer Cache Does the Saving for You?, 60 Fla. L. Rev. 1205, 1213-14 (2008).

5. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. See note 2, supra. "Means" was substituted for the phrase "includes the creation of" used in the statutory definition. No change in substance was intended.

6. Section 948.01(1) defines "child" as "a person who has not attained the age of 18 years."

7. Section 948.01(7) defines "sexually explicit conduct" as follows:

> "Sexually explicit conduct" means actual or simulated:
> (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
> (b) Bestiality;
> (c) Masturbation;
> (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
> (e) Lewd exhibition of intimate parts.

8. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

> "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

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9. The statement of the third element reflects changes made by 2011 Wisconsin Act 271 [effective date: April 24, 2012]. The change added "or reasonably should know" as an alternative to "know." It also deleted the reference to "the character and content" of the conduct and replaced it with "material that contains depictions of" sexually explicit conduct. The Committee concluded that the best way to describe this requirement to the jury is to insert the name of the type of conduct used in the preceding element.

10. The "knew or reasonably should have known" requirement is set forth in § 948.12(1m)c. This is contrary to the general rule in the Criminal Code that knowledge of the age of a minor victim is not required and mistake about age is not a defense. See §§ 939.23(6) and 939.43(2). This element satisfies the requirement that pornography statutes include "scienter." State v. Schaefer, 2003 WI App 164, ¶36, 266 Wis.2d 719, 668 N.W.2d 760.

11. Section 948.12 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of child pornography: possession of a recording, under sec. 948.12(1m), at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2146B CHILD PORNOGRAPHY: EXHIBITING OR PLAYING A RECORDING — § 948.12(2m)

Statutory Definition of the Crime

Section 948.12(2m) of the Criminal Code of Wisconsin, is violated by one who knowingly exhibits or plays a recording of a child engaged in sexually explicit conduct, knows the character and content of the sexually explicit conduct in the material, and knows or reasonably should know that the child has not attained the age of 18 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly (exhibited)[1] (played) a recording.[2]

   "Recording" means a reproduction of an image or a sound or the storage of data representing an image or a sound.[3]

2. The recording showed a child engaged in sexually explicit conduct.

   A child is a person who is under the age of 18 years.[4]

   "Sexually explicit conduct" means[5] actual or simulated [sexual intercourse] [bestiality] [masturbation] [sexual sadism or sexual masochistic abuse] [lewd exhibition of (name intimate part)].[6]

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3. The defendant knew that the recording showed a person engaged in actual or simulated _____.[7]

4. The defendant knew or reasonably should have known[8] that the person shown in the recording engaged in sexually explicit conduct was under the age of 18 years.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS D FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[9]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2146B was originally published in 2002 and revised in 2004 and 2007. The 2007 revision involved adding a special question at the end of the instruction and updating the Comment. This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

This instruction is for a violation of § 948.12(2m), as created by 2001 Wisconsin Act 16, effective date: September 1, 2001. For a violation of § 948.12(1m), as amended by 2001 Wisconsin Act 16, see Wis JI-Criminal 2146A, Possession of Child Pornography.

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The United States Supreme Court upheld the constitutionality of a New York statute prohibiting persons from distributing child pornography in New York v. Ferber, 458 U.S. 747 (1982). The statute before the court differed from § 948.12, but some of the decision's discussion of constitutional issues implicated by prohibiting child pornography may be relevant to questions arising under the Wisconsin statute.

Section 948.12 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 3 years for violations of § 948.12.

1. 2001 Wisconsin Act 16 created § 948.01(1d), which reads as follows:

(1d) "Exhibit," with respect to a recording of an image that is not viewable in its recorded form, means to convert the recording of the image into a form in which the image may be viewed.

2. Section 948.12(2m)(a) requires that "the person knows that he or she has exhibited or played the recording." Rather than state this as a separate element, the Committee concluded it was clearer to use the phrase "knowingly (exhibited) (played) a recording."

3. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

4. Section 948.01(1) defines "child" as "a person who has not attained the age of 18 years."

5. Section 948.01(7) defines "sexually explicit conduct" as follows:

"Sexually explicit conduct" means actual or simulated:
(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts.

6. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

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The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

7. Insert the name of the type of conduct used in the preceding element. Section 948.12(2) requires that "the person know the character and content of the sexually explicit conduct shown in the material." (Emphasis added.) The Committee concluded that stating this requirement as, for example, "knowing that the photograph showed actual or simulated sexual intercourse" adequately covers the "character and content" aspect.

8. The "knew or reasonably should have known" requirement is explicitly set forth in § 948.12(2m)(c). This is contrary to the general rule in the Criminal Code that knowledge of the age of a minor victim is not required and mistake about age is not a defense. See §§ 939.23(6) and 939.43(2). The same element in sub. (1m) was held to satisfy the requirement that pornography statutes include "scienter." State v. Schaefer, 2003 WI App 164, ¶36, 266 Wis.2d 719, 668 N.W.2d 760.

9. Section 948.12 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of child pornography: exhibiting or playing a recording, under sec. 948.12(2m), at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME IV

Wisconsin Criminal Jury Instructions Committee

University of Wisconsin Law School

[Cite as Wis JI-Criminal]

• Includes Release No. 58

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2660 OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — CRIMINAL OFFENSE — 0.08 GRAMS OR MORE — § 346.63(1)(b)

Statutory Definition of the Crime

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while that person has a prohibited alcohol concentration.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[3] on a highway.[4]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][5]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][6]

2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

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Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[7]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[8]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[9] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[10] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[11]

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[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2660 was originally published in 1982 and revised in 1985, 1993, 2004, and 2006. This revision was approved by the Committee in June 2020; it added to the Comment.

The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with two or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

The 2020 revision of the Comment reflected changes to the felony classes of fourth and subsequent offenses made by 2015 Wisconsin Act 371 [effective date: April 27, 2016]. The revision also reflected changes made by 2019 Wisconsin Act 106 [effective date: March 1, 2020] to the penalty provision of § 346.65(2)(am)5. This amendment increased the mandatory minimum confinement period of fifth and sixth offenses to not less than eighteen months, unless the court finds that a lesser term of confinement would be in the best interests of the community.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

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The prohibited alcohol concentration is 0.02 for persons who have three or more prior convictions, suspension or revocations, as counted under § 343.307(1). See § 340.01(46m)(c) and Wis JI-Criminal 2660C.

This instruction is for a criminal offense under § 346.63(1)(b), which applies if "the total number of suspensions, revocations and convictions counted under § 343.307(1) within in a 10-year period, equals two . . ." Section 346.65(2)(b). The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). The time period is measured from the date of the refusals or violations. § 346.65(2c).

The penalty for criminal violations of § 346.63(1) increases with the number of prior convictions the defendant has. See § 346.65(2).). Fourth offenses are Class H felonies. § 346.65(2)(am)4. Fifth and sixth offenses are Class G felonies. § 346.65(2)(am)5. Seventh, eighth, and ninth offenses are Class F felonies. § 346.65(2)(am)6. Tenth and subsequent offenses are Class E felonies. § 346.65(2)(am)7. This instruction may be used without change for all criminal violations. Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

The maximum penalty for these offenses is doubled if there was a child under the age of 16 years in the defendant's vehicle. See § 346.65(2)(f) and Wis JI-Criminal 999.

First violations of the statute are forfeitures, see Wis JI-Criminal 2660A. For instructions for cases where both "under the influence" and "prohibited alcohol concentration" charges are submitted based on a single act of driving, see Wis JI-Criminal 2668 [forfeitures] and Wis JI-Criminal 2669 [criminal charges].

The constitutionality of penalizing the "status" of having a prohibited level of alcohol concentration has been upheld. State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984); State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989). Defendants may not litigate the validity of the "partition ratio" that is used to calculate the prohibited breath alcohol level. McManus, 152 Wis.2d 113, 123.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. See Wis JI-Criminal 2600 Introductory Comment, Sec. V., regarding the amendment of the definition of "prohibited alcohol concentration" by 2003 Wisconsin Act 30 [effective date: September 30, 2003].

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the second element. It then provides for using the appropriate measure of alcohol concentration – blood alcohol or alcohol in the breath – in the definition of the second element. For cases involving the 0.02 level, see Wis JI-Criminal 2660C.

3. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

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4. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

5. This is the definition of "drive" provided in § 346.63(3)(a).

6. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600, Introductory Comment, Sec. V.

8. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of defendants with 3 or more priors any prima facie effect. So there is no statutory authority for the typical statement that discusses the evidentiary value of test results.

9. Regarding instructions on test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2663 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT — CRIMINAL OFFENSE — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of an intoxicant.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[3] on a highway.[4]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][5]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][6]

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.[7]

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Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).[8]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[9]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[10] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[11] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to

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decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[12]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2663 was originally published in 1966 and revised in 1978, 1981, 1982, 1986, 1993, 2004, and 2006. This revision was approved by the Committee in June 2020; it added to the Comment.

The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with two or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. For persons with two or fewer priors, a test showing 0.08 grams or more is prima facie evidence of being "under the influence of an intoxicant." § 885.235(1)(c). The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

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The 2020 revision to the Comment reflected changes to the felony classes of fourth and subsequent offenses made by 2015 Wisconsin Act 371 [effective date: April 27, 2016]. The revision also reflected changes made by 2019 Wisconsin Act 106 [effective date: March 1, 2020] to the penalty provision of § 346.65(2)(am)5. This amendment increased the mandatory minimum confinement period of fifth and sixth offenses to not less than eighteen months, unless the court finds that a lesser term of confinement would be in the best interests of the community.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

This instruction is for a criminal offense under § 346.63(1)(a), which applies if "the total number of suspensions, revocations and convictions counted under § 343.307(1) within in a 10-year period, equals two . . ." Section 346.65(2)(b). The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). The time period is measured from the date of the refusals or violations. § 346.65(2c).

The penalty for criminal violations of § 346.63(1) increases with the number of prior convictions the defendant has. See § 346.65(2). Fourth offenses are Class H felonies. § 346.65(2)(am)4. Fifth and sixth offenses are Class G felonies. § 346.65(2)(am)5. Seventh, eighth, and ninth offenses are Class F felonies. § 346.65(2)(am)6. Tenth and subsequent offenses are Class E felonies. § 346.65(2)(am)7. This instruction may be used without change for all criminal violations. Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

The maximum penalty for these offenses is doubled if there was a child under the age of 16 years in the defendant's vehicle. See § 346.65(2)(f) and Wis JI-Criminal 999.

First violations of the statute are forfeitures, see Wis JI-Criminal 2663A. For instructions for cases where both "under the influence" and "prohibited alcohol concentration" charges are submitted based on a single act of driving, see Wis JI-Criminal 2668 [forfeitures] and Wis JI-Criminal 2669 [criminal charges].

For offenses involving operating under the influence of a controlled substance, see Wis JI-Criminal 2664.

For offenses involving operating under the influence of "any other drugs," see Wis JI-Criminal 2666.

For offenses involving operating under the influence of "any combination of an intoxicant and any other drug," see Wis JI-Criminal 2666A.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

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2. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

3. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

5. This is the definition of "drive" provided in § 346.63(3)(a).

6. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. The instruction is drafted for cases involving the influence of an intoxicant. See note 2, supra. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

8. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

10. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the "blood alcohol curve," see Wis JI-Criminal JI 2600 Introductory Comment, Sec. VII.

12. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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2664 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE — CRIMINAL OFFENSE — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (drove) (operated) a motor vehicle[2] on a highway.[3]

Definition of "Drive" or "Operate"

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][4]

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][5]

2. The defendant was under the influence of (name controlled substance)[6] at the time the defendant (drove) (operated) a motor vehicle.

[(Name controlled substance) is a controlled substance.][7]

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The Definition of "Under the Influence"

"Under the influence" means that the defendant's ability to operate a vehicle was impaired because of consumption of a controlled substance.[8]

[Not every person who has consumed (name controlled substance) is "under the influence" as that term is used here.][9] What must be established is that the person has consumed a sufficient amount of (name controlled substance) to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2664 was originally published in 1979 and revised in 1982, 1986, 1993, and 2003. This revision was approved by the Committee in June 2020; it added to the Comment. See footnotes 6 and 7 below.

This instruction is for a criminal offense under § 346.63(1)(a), which applies if "the total number of suspensions, revocations and convictions counted under § 343.307(1) within in a 10-year period, equals two . . ." Section 346.65(2)(b). The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). The time period is measured from the date of the refusals or violations. § 346.65(2c).

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First violations of the statute are forfeitures. See Wis JI-Criminal 2664A for an instruction for a forfeiture offense involving operating while under the influence of a combination of an intoxicant and a controlled substance.

For offenses involving operating under the influence of "any other drugs," see Wis JI-Criminal 2666.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes of individual instructions. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

3. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

4. This is the definition of "drive" provided in § 346.63(3)(a).

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. To avoid confusion, the Committee strongly suggests that only the name of the statutorily listed controlled substance be used throughout the instruction, even if the specific substance alleged to have been in the defendant's blood is not listed in Chapter 961. For example, if the substance is heroin, "heroin," should be used throughout. Conversely, if the substance is a synthetic cannabinoid not listed by name in Section 961.14(4)(tb), "synthetic cannabinoid" should be used throughout the instruction, not the specific variation alleged to have been in the defendant's blood. Section 340.01(9m) provides that for purpose of the Vehicle Code, "controlled substance" has the meaning specified in § 961.01(4), which provides: "'Controlled substance' means a drug, substance or immediate precursor included in schedules I to V of sub. II." The schedules are found in §§ 961.14, 961.16, 961.18, 961.20, and 961.22.

7. It is helpful to instruct the jury that any statutorily listed controlled substance is a "controlled substance," as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the defendant's blood tested positive for cocaine, the jury should be instructed: "Cocaine is a controlled substance."

In contrast, if the evidence shows that the defendant's blood tested positive for "5F-AMQRZ," a non-statutorily listed synthetic cannabinoid, the jury should be instructed: "A synthetic cannabinoid is a controlled substance," *not* that "5F-AMQRZ" is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

8. This definition of "under the influence" is adapted from the one used for offenses involving alcoholic beverages. See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

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9. The sentence in brackets is appropriate for cases involving the consumption of substances which are roughly similar in their effect on a person as alcohol. That is, a person could use some substances in a limited degree and, like the person who consumes a limited amount of alcohol, not be "under the influence" as that term is used here.

Some controlled substances, however, have such extreme effects that the sentence in brackets should not be used.

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2664A OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF A COMBINATION OF AN INTOXICANT AND A CONTROLLED SUBSTANCE — CIVIL FORFEITURE — § 346.63(1)(a)

Statutory Definition of the Crime

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while under the influence of a combination of an intoxicant and a controlled substance.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[2] must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant (drove) (operated) a motor vehicle[3] on a highway.[4]

   ["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.][5]

   ["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.][6]

2. The defendant was under the influence of a combination of an intoxicant and (name controlled substance)[7] at the time the defendant (drove) (operated) a motor vehicle.

   [(Name controlled substance) is a controlled substance.][8]

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The Definition of "Under the Influence"

"Under the influence" means that the defendant's ability to operate a vehicle was impaired because of consumption of a combination of an alcoholic beverage and a controlled substance.[9]

[Not every person who has consumed alcoholic beverages and controlled substances is "under the influence" as that term is used here.][10] What must be established is that the person has consumed a sufficient amount of alcohol or of a controlled substance or both to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, ADD THE FOLLOWING.[11]

[The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). An analysis showing that there was [.04 grams or more but less than .08 grams of alcohol in 100 milliliters of the defendant's blood] [.04 grams or more but less than .08 grams of alcohol in 210 liters of the defendant's breath] at the time the test was taken may be

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considered by you in determining whether the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating). However, by itself it is not a sufficient basis for finding that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating).

Therefore, you may consider this evidence regarding an alcohol concentration test along with all of the other credible evidence in the case, giving to it the weight you believe it is entitled to receive.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[12]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2664A was originally published in 1986 and revised in 1993, 2004, and 2005. This revision was approved by the Committee in in June 2020; it added to the Comment. See footnotes 7 and 8 below.

This instruction is for a first offense under § 346.63(1)(a), involving the combined influence of an intoxicant a controlled substance. For offenses involving operating under the influence of a controlled substance alone, see Wis JI-Criminal 2664. For offenses involving operating under the influence of "any other drugs," see Wis JI-Criminal 2666.

Wisconsin case law interpreted earlier versions of the drunk driving statutes in a way that would seem to cover situations involving the combined influence of alcohol and controlled substances or drug. Waukesha v. Godfrey, 41 Wis.2d 401, 406, 164 N.W.2d 314 (1960), cited with approval a Pennsylvania case holding that:

> If liquor shares its influence with another influence and is still the activating cause of the condition which the statute denounces it can be truthfully said that the driver was under the influence of liquor. Commonwealth v. Rex (1951), 168 Pa. Super. 628, 632, 82 Atl.2d 315.

The Godfrey rule also applies to situations where an intoxicant combines its influence with medication or where a person's poor health or physical condition reduces tolerance to alcohol. 41 Wis.2d 401, 407.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes of individual instructions. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

3. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

5. This is the definition of "drive" provided in § 346.63(3)(a).

6. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

7. To avoid confusion, the Committee strongly suggests that only the name of the statutorily listed controlled substance be used throughout the instruction, even if the specific substance alleged to have been in the defendant's blood is not listed in Chapter 961. For example, if the substance is heroin,

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"heroin," should be used throughout. Conversely, if the substance is a synthetic cannabinoid not listed by name in Section 961.14(4)(tb), "synthetic cannabinoid" should be used throughout the instruction, not the specific variation alleged to have been in the defendant's blood. Section 340.01(9m) provides that for purpose of the Vehicle Code, "controlled substance" has the meaning specified in § 961.01(4), which provides: "'Controlled substance' means a drug, substance or immediate precursor included in schedules I to V of sub. II." The schedules are found in §§ 961.14, 961.16, 961.18, 961.20, and 961.22.

8. It is helpful to instruct the jury that any statutorily listed controlled substance is a "controlled substance," as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the defendant's blood tested positive for cocaine, the jury should be instructed: "Cocaine is a controlled substance."

In contrast, if the evidence shows that the defendant's blood tested positive for "5F-AMQRZ," a non-statutorily listed synthetic cannabinoid, the jury should be instructed: "A synthetic cannabinoid is a controlled substance," not that "5F-AMQRZ" is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

9. This definition of "under the influence" is adapted from the one used for offenses involving alcoholic beverages. See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The sentence in brackets is appropriate for cases involving the consumption of substances which are roughly similar in their effect on a person as alcohol. That is, a person could use some substances in a limited degree and, like the person who consumes a limited amount of alcohol, not be "under the influence" as that term is used here.

Some controlled substances, however, have such extreme effects that the sentence in brackets should not be used.

11. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect."

12. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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SM-34A DETERMINING SENTENCE CREDIT UNDER SECTION 973.155

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I. Introduction

Wisconsin Stat. § 973.155(1) establishes the basic rule governing sentence credit: An offender is entitled to sentence credit for time he or she spent in custody in connection with the course of conduct for which sentence is imposed. In addition, § 973.155(2) requires a sentencing court to make a specific finding of the number of days for which sentence credit is to be granted to an offender under § 973.155 and to include that finding in the judgment of conviction. The purpose of this Special Material is to assist the court in making a proper determination of sentence credit.

A sentencing court must give credit accorded by the statute because an offender may not serve more time than that for which he is sentenced.[1] Sentence credit has the effect of reducing the amount of time the offender serves in jail or, for bifurcated sentences, in prison under the term of confinement before reaching the date on which he or she is released to the term of extended supervision. That is because, with one exception,[2] when credit is granted an offender's sentence is computed as having begun as many days before the date of sentencing as days credit have been granted. For example, an offender sentenced to 10 years of imprisonment, consisting of five years of confinement and five years of extended supervision, and entitled to six months of credit will be released to extended supervision four years, six months from the date of sentencing.

The basic rule for determining credit is easily stated, but its application can be difficult, particularly in situations in which an offender has multiple cases with different periods of pretrial custody and concurrent or consecutive sentences. To help the sentencing court understand and apply the basic rule, this Special Material proceeds as follows. First, it explains the basic rule governing sentence credit. Next, it discusses procedural and technical aspects of making a credit determination. It then provides a detailed explanation of the basic rule used to determine the number of days for which credit is due. After that explanation, it discusses situations that arise with some regularity, and illustrates, with reference to case law, if available, how to determine credit in those situations. Finally, it provides information about correcting a finding of sentence credit.

II. The Basic Rule

The basic rule for determining sentence credit is set forth in § 973.155(1) and (1m), which read as follows:

> **(1)**(a) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct

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for which sentence was imposed. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:

1. While the offender is awaiting trial;
2. While the offender is being tried; and
3. While the offender is awaiting imposition of sentence after trial.

(b) The categories in par. (a) and sub. (1m) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under s. 302.113 (8m), 302.114 (8m), 304.06 (3), or 973.10 (2) placed upon the person for the same course of conduct as that resulting in the new conviction.

(1m) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody as part of a substance abuse treatment program that meets the requirements of s. 165.95 (3), as determined by the department of justice under s. 165.95 (9) and (10), for any offense arising out of the course of conduct that led to the person's placement in that program.

The basic rule, then, is that entitlement to sentence credit depends on the offender having been in custody in connection with the course of conduct for which sentence is imposed.[3] A defendant seeking sentence credit has the burden of demonstrating both custody and its connection with the course of conduct for which the sentence was imposed.[4] Entitlement does not depend on the offender's inability to post bond.

The focus of this Special Material is the determination of sentence credit for days spent in custody up to the date of sentencing, as identified in the three periods of time listed in § 973.155(1)(a).[5] It will also address credit when imposing sentence in sentence withheld – probation ordered cases, which may include time the offender spent in custody while on probation.

III. Procedure for Making the Finding of Sentence Credit in All Cases

A. Tell the parties to be prepared to address sentence credit at sentencing

A great saving of judicial time and energy can be realized if an accurate determination of sentence credit is made at the time the judgment of conviction is entered, when the facts are fresh, records are available, and the defendant and counsel are present to address the issue. Therefore, the court should require the parties to be prepared

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to address the sentence credit issue at the time of sentencing. Disputes about the number of days for which credit is due should be anticipated and settled before judgment is entered, by stipulation or, if necessary, further hearing. Accurate information and the informed participation of prosecutor and defense counsel are essential.

B. Make a finding after the proper disposition has been determined

In all cases, the court should first follow its usual procedure to determine the appropriate disposition. After the decision as to type and length of disposition has been made, the finding of the number of days for which sentence credit is due should be made.[6]

C. Make a finding in every case

The finding regarding sentence credit should be made in every case, including those where the disposition is probation or the sentence is to home detention under § 973.03(4).[7] Although § 973.155 does not explicitly require that the sentence credit determination be made in cases where sentence is withheld and probation ordered, making the finding in probation cases will document the finding of credit due up to the date of disposition and make it available if probation is later revoked. (NOTE: The finding on the original judgment will relate only to the credit due as of the date of that judgment; additional credit may also be appropriate at the time of revocation for custody during the revocation process. The consideration of other periods of time in the sentence withheld – probation ordered and revoked case is discussed below, in Section V.B.)

In a case in which the disposition is probation and the court orders jail time as a condition under § 973.09(4), any sentence credit the court grants does not have to be credited against the condition time, although the court has discretion to do so.[8]

D. Make the finding in terms of a number of days

The defendant is entitled to a day of sentence credit for each calendar day during which they spent at least part of the day in custody. State v. Johnson, 2018 WI App 2, 379 Wis.2d 684, 906 N.W.2d 704, ¶8. Only the number of days for which credit is due should be determined by the court. That number should be entered on the judgment of conviction. The standard judgment of conviction form adopted by the Judicial Conference and mandated for use under § 971.025(1) includes a blank for entering a finding of the number of days of credit.

The finding should be in terms of the number of days and should not be expressed as weeks, months, years, or fractions thereof. The sentencing court should not determine

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the date sentence is to commence. The prison registrar or jail custodian will compute the sentence. As noted in the Introduction, the sentence will be computed as though it had begun as many days before the date of sentencing as days credit have been granted. That is, the sentence of an offender sentenced by the court on May 1, and entitled to 30 days sentence credit, will be computed as though it began on April 1. The date on which the offender is eligible for release will be calculated by the prison registrar or jail custodian as though the sentence had begun April 1.

E. If no credit is due, make that finding

The court should make a specific finding even when it determines that no credit is due. Insert "No" or "0" in the blank provided for the sentence credit finding. This will avoid future questions about whether credit was considered.

F. Apply the credit to the sentence being served

When sentence credit is applied at the time of sentencing, the circuit court should apply sentence credit to the term of incarceration.[9] For instance, if an offender is entitled to credit applicable to charges for which he receives both an imposed sentence and a stayed sentence, the credit must be applied to the imposed sentence.[10]

IV. An Explanation of the Basic Rule

The basic rule established by § 973.155 is that an offender is entitled to sentence credit if the person was A) in custody and the custody was B) in connection with C) the course of conduct for which sentence is imposed. If one of these requirements is not met, the defendant is not entitled to credit.

A. In custody…

"In custody" is not defined in § 973.155, but the Wisconsin Supreme Court has held that "for purposes of sentence credit an offender's status constitutes custody whenever the offender is subject to an escape charge for leaving that status." State v. Magnuson, 2000 WI 19, ¶31, 233 Wis.2d 40, 606 N.W.2d 536.

This means the inquiry into whether an offender was in "custody" begins with the definition of "custody" provided in the escape statute, § 946.42(1)(a)1. In the majority of cases, application of that definition will be sufficient. In some cases, however, the court may also have to consider whether the offender was in a status that subjected him or her to an escape charge for leaving that status.

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1. "Custody" based on liability under the escape statute

a. "Custody" as defined in § 946.42(1)(a)1.

Section 946.42(1)(a)1. provides that "custody" includes without limitation the following:

a. Actual custody of an institution, including a juvenile correctional facility, as defined in s. 938.02 (10p), a secured residential care center for children and youth, as defined in s. 938.02 (15g), a juvenile detention facility, as defined in s. 938.02 (10r), a Type 2 residential care center for children and youth, as defined in s. 938.02 (19r), a facility used for the detention of persons detained under s. 980.04 (1), a facility specified in s. 980.065, or a juvenile portion of a county jail.[11]

b. Actual custody of a peace officer or institution guard.

bm. Actual custody or authorized physical control of a correctional officer.

c. Actual custody or authorized physical control of a probationer, parolee, or person on extended supervision by the department of corrections.

e. Constructive custody of persons placed on supervised release under ch. 980.

f. Constructive custody of prisoners and juveniles subject to an order under s. 48.366, 938.183, 938.34 (4d), (4h), or (4m), or 938.357 (4) or (5)(e) temporarily outside the institution whether for the purpose of work, school, medical care, a leave granted under s. 303.068, a temporary leave or furlough granted to a juvenile, or otherwise.

g. Custody of the sheriff of the county to which the prisoner was transferred after conviction.

h. Custody of a person subject to a confinement order under s. 973.09(4).

The following situations are within this definition of custody:

- Detention in the county jail before bail is set or thereafter;

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- Detention in the county jail during nonworking hours as a condition of bail release or probation;[12]

- Commitment for the determination of competency to stand trial under § 971.14(2) or commitment as not competent to stand trial under § 971.14(5);

- Detention in jail in another state when that detention results at least in part from a Wisconsin warrant;[13]

- Time spent in secure juvenile detention pending a waiver to adult court, when jurisdiction is waived and an adult sentence is imposed;[14]

- Time spent at an in-house rehabilitation center when "temporarily outside the [jail] for the purpose of medical care";[15]

b. "Custody" based on unauthorized departure from certain correctional settings

Under Magnuson a person who is in a correctional program that does not constitute "custody" under the definition in § 946.42(1)(a) is still entitled to credit if the statute that creates the correctional program allows for an escape charge for unauthorized departure from the program. Magnuson, 233 Wis.2d 40, ¶¶26-30. In most cases this basis for "custody" will not come into play, as the correctional programs covered by the definition are for offenders who have already been sentenced. Nonetheless, such claims may arise in cases where an offender was in custody on more than one case or charge, so the court and counsel should be aware of the programs that are covered. They include:

- The community residential confinement program under § 301.046;

- The intensive sanctions program under § 301.048;

- Jail labor off the institution grounds under § 302.37(4);

- Home detention under § 302.425;

- Prison labor off the institution grounds under § 303.03;

- Work release plans for prison inmates under § 303.065; and

- County work camps under § 303.10;

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- Placement of a juvenile offender in a setting specified under §§ 938.357(4)(a), 938.533(3)(a), 938.538(4)(a), and 938.539(1).

2. Participation in certain AODA programs covered by § 973.155(1m)

Under § 973.155(1m), a person is entitled to credit "for all days spent in custody as part of a substance abuse treatment program that meets the requirements of s. 165.95(3), as determined by the Office of Justice Assistance under s. 165.95(9) and (10) for any offense arising out of the course of conduct that led to the person's placement in that program." The substance abuse treatment programs referred to are those mandated for participants in a qualified "treatment" court.

The Committee concluded that the standard for determining whether the person's status constituted "custody" for purposes of sub. (1m) is the same standard that applies under sub. (1): If the offender was subject to an escape charge for leaving the status, sentence credit should be granted for time spent in that status. Further, § 973.155(1m) is clear that credit for the time the offender was in the treatment program may be applied only to the sentence for the offense being handled in the treatment court.

3. Situations not considered to constitute "custody"

Not included within the definitions of "custody" for sentence credit purposes are the following situations:

- Conditions of release on bond that do not involve spending parts of each day in the county jail;[16]

- Voluntary participation in drug, alcohol, or other treatment programs even though the offender may not be completely free of all restraint on his liberty during such program,[17] unless the program is covered under § 973.155(1m);

- Home detention under a federal consent decree designed to reduce jail overcrowding;[18]

- Time spent on electronic monitoring as a condition of probation.[19]

- Time spent in the community after the person reports to jail but is turned away due to overcrowding or after the person is released early from a period of confinement, even though the person was turned away or released early through no fault of his or her own.[20]

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B. ...in connection with...

1. Determining whether a connection exists

The requirement that custody be "in connection with" the course of conduct means simply that the custody must be, at least in part, the result of a legal status (arrest, bail, Department of Corrections hold, court order, etc.) stemming from the course of conduct for which sentence is being imposed. If the offender was under restraint for reasons related to the course of conduct, credit is required.[21]

The connection between the custody and the conduct for which sentence is imposed must be a factual connection, not just a "procedural" or "tangential" one.[22] For example, the fact that an offender is sentenced in multiple cases at the same time does not create a connection between custody and the sentences imposed.[23]

Where there are multiple charges an offender's custody may be "in connection with" one charge but not another. Thus, the filing of a detainer against someone already in custody on other charges does not result in "custody" on the charges covered by the detainer.[24] Similarly, an offender is in general not entitled to sentence credit under § 973.155 for custody that is being served in satisfaction of another unrelated criminal sentence.[25]

For example, if an offender serving a sentence for theft is charged with battery to another inmate, his custody is connected only to the theft sentence, not to the battery charge, as long as he is serving that theft sentence.[26]

As another example, assume a person is released on personal recognizance on one charge but later is arrested on a different charge and remains in custody as a result of an inability to post cash bail. When sentenced, the person is entitled to credit only on the sentence for the charge on which he was held in custody. This is true even if the charge on which he was in custody was bail jumping based on a violation of the conditions of the personal recognizance bond in the other case.[27]

2. A connection between custody and a charge may be "severed"

When an offender has multiple charges, a period of custody may initially be connected to all of the charges, but an event relating to one of the charges may "sever" that connection. Once the connection between custody and a particular charge is severed, the offender no longer earns credit toward that charge.

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The most common way for a connection between custody and multiple charges to be severed is by sentencing on one of the charges. For instance, assume a person is arrested and held in custody in two separate cases, A and B. If he is sentenced in Case A before he is sentenced in Case B, the sentencing in Case A severs the connection between the custody and Case B, and he is in custody solely for the conviction in Case A. Thus, the person is not entitled to credit toward Case B for any time in custody after being sentenced in Case A.[28]

C. ...the course of conduct for which sentence is being imposed

The use of "course of conduct" rather than a more limited term, such as "offense" or "crime," suggests that credit is to extend to periods of custody that may not have been caused by the specific crime for which sentence is ultimately imposed. Credit is required in at least four situations which raise the "course of conduct" issue:

1. Where several crimes were charged as a result of a single course of conduct, but the offender is convicted of only one crime. Thus, an offender held in custody as a result of charges of theft, burglary, and battery, all resulting from a single incident, must receive sentence credit even if he is convicted of only one of the crimes charged;

2. Where offenses for which the person spent time in custody are "read in" for purposes of sentencing in another case, the offender is entitled to credit for the custody on the read-in offenses, regardless of whether the read-in offenses are factually connected to the course of conduct for which sentence was imposed;[29]

3. Where the offender is convicted of a crime which is a lesser included offense of the crime originally charged. Thus, an offender is entitled to credit if he was arrested for and charged with armed robbery even if he is convicted of the lesser included crime of theft; and

4. Where the offender is held in custody on a probation, parole, or extended supervision hold which is issued due to the course of conduct for which sentence is imposed. (See § 973.155(1)(b).) Credit will be due toward both the sentence for the course of conduct and the sentence in the case in which the hold was issued up to the time the defendant begins serving one of the sentences, unless the sentences are consecutive.[30]

Note, however, that "course of conduct" does not mean "criminal episode." In State v. Tuescher, 226 Wis.2d 465, 595 N.W.2d 443 (Ct. App. 1999), the court held "a defendant earns credit toward a future sentence while serving another sentence only when both sentences are imposed for the same specific acts." Id., 479.[31]

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V. Applying the Basic Rule in Common Situations

A. The credit determination to make at the time of original disposition in all cases

The determination to be made at the time of original disposition in all cases is the period of time the offender spent in custody in connection with the course of conduct up to the date of sentencing. The statute identifies three periods of time specifically, namely, those occurring:

1) while the offender is awaiting trial;
2) while the offender is being tried; and
3) while the offender is awaiting imposition of sentence after trial.

B. Imposing sentence after probation has been revoked in a sentence withheld case

1. Determining sentence credit at the time of sentencing after revocation

The basic procedure outlined above should have been followed when the original disposition was ordered in the sentence withheld – probation ordered case. If probation is revoked and an offender is returned to court for imposition of sentence, another sentence credit determination must be made. Three separate periods of time are relevant to the new sentence credit determination:

- Days in custody prior to original disposition – this finding should be found in the judgment of conviction entered at the time of original disposition;

- Days in custody after original disposition and through the date of probation revocation (for, *e.g.*, conditional jail time, holds, or sanction time) – this finding should be found in the revocation order and warrant issued by the department or in the revocation summary provided by the department; and

- Days in custody after revocation, awaiting imposition of sentence – this finding must be made by the sentencing court.

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2. "Custody" during the period of probation

Questions may arise about what constitutes "custody in connection with the course of conduct" in the sentence withheld case. These relate primarily to whether certain restrictive situations constitute "custody." It is clear that time spent in jail awaiting revocation should be credited. But restrictions on an offender during the probationary period raise questions:

a. Jail time as a condition of probation

Section 973.155 is not explicit about whether sentence credit is required for time spent in the county jail as a condition of probation. However, the definition of "custody" under the escape statute expressly covers time spent in jail as a condition of probation.[32] That means the offender was in custody while serving that condition time and is therefore entitled to credit for that time toward a sentence imposed after revocation of probation.

b. Time in a treatment facility as a condition of probation

If a probationer spent time in, for example, a drug treatment facility, he or she will be entitled to credit for that time if one of the following applies:

1. The person's status was such that he or she was in "custody" under the standard discussed above in Section IV.A 1, because the offender was subject to an escape charge for leaving the status.

2. Treatment program is covered under § 973.155(1m) as discussed in Section IV.A 2.

C. Sentence credit in multiple sentence situations

Proper determination of sentence credit can become complex in cases where several sentences are involved. The possible situations and relationships are endless.

Problems can be minimized if the court informs itself about the credit applicable to any previously imposed sentence and ensures that each judgment for the sentences it imposes has a finding of sentence credit. This can most easily be achieved by requiring the parties to come to court prepared to discuss and settle the sentence credit issue.

In light of the basic rule discussed above, in Section IV, the Committee recommends the following guiding principles in multiple sentence situations:

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- When sentence A is to run concurrently with sentence B, the custody credited to sentence A must be factually connected to the course of conduct for which sentence A is imposed.

- When sentence A is to run consecutively to sentence B, the custody factually connected to sentence A is credited to the sentence only if the custody has not already been credited to sentence B. The aim is to credit the total sentence (consisting of all consecutive sentences put together) with one day for each day spent in custody without duplication of credit for time in custody in connection with more than one of the sentences.

1. Concurrent sentences

When concurrent sentences are imposed for offenses arising from the same course of conduct, sentence credit is to be determined as a total number of days and is to be credited against each sentence imposed. Credit against each sentence is required because credit against only one sentence would be negated by the concurrent sentence. Thus, if the credit was not awarded against both sentences, the offender would not receive the credit to which he is entitled.[33]

However, if concurrent sentences are imposed for offenses that do not arise out of the same course of conduct, the court must determine which sentence any specific period of time in custody should be credited against. As noted above in Section IV.B.2, as a general rule sentencing on one charge severs the connection between the custody and other pending charges. Thus, when custody is in connection with multiple, unrelated charges, credit should be granted on all concurrent sentences imposed for the charges up to the time the defendant begins serving one of the sentences. The amounts may not be equal. Also, the fact that concurrent sentences are imposed at the same time does not serve to transform custody connected to one case into custody connected to another case.[34]

Examples of concurrent sentence situations follow.

a. Multiple counts in a single judgment

Concurrent Sentence Example 1
Smith was arrested for two burglaries, charged in a two-count information, and convicted of both charges on the same day. He spent one year in jail awaiting disposition. He was sentenced to serve five years of imprisonment on each count, the sentences to run concurrently with one another.

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The judgment of conviction should order that credit is due for 365 days pursuant to § 973.155.

When the judgment reaches the prison, the registrar will credit each of the concurrent sentences with 365 days, thus computing the sentences as though they had begun 365 days earlier.

b. Sentences on unrelated charges for which different amounts of credit are due

Concurrent Sentence Example 2
Johnson is arrested and charged with a burglary and remains in custody for 10 days before posting bail. He is later arrested for a new burglary and remains in custody, unable to post bail. 150 days after his second arrest, he is convicted of both charges and given two years of imprisonment on each count, concurrent.

The judgment of conviction on the first burglary should order that credit is due for 10 days, while the judgment for the second conviction should order 150 days of credit.

This illustrates one of those situations where the periods of time for which credit is due on unrelated concurrent sentences will not line up with each other. Some credit will be due on one sentence and a different amount of credit will be due on another.

In these cases, the registrars shall properly compute the credit ordered against each sentence. Taking the above example, if a defendant is entitled to 10 days of credit on one two-year sentence and 150 days of credit on a concurrent two-year sentence, the registrar will compute each sentence separately and the defendant's controlling sentence will be the two-year sentence with the lesser amount of credit.

c. A sentence imposed to run concurrently with a sentence imposed earlier

In this situation, the determinative questions are the existence of a connection between any of the offender's time in custody and the offense for which sentence is being imposed and, if there is a connection, whether it was ever "severed."

Concurrent Sentence Example 3
Sauk County officials suspected Smith of committing an armed robbery in Sauk County and discover that he is serving a sentence in the Wisconsin State Prison on another charge. Sauk County filed a detainer at the prison. Six months later, Smith is convicted on the Sauk County charge and is

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sentenced to a term of imprisonment of 10 years, to run concurrently to the sentence he was already serving.

The judgment of conviction in Sauk County should indicate that Smith is entitled to no sentence credit under § 973.155. All the time Smith spent in custody after the filing of the Sauk County charge was spent in service of the previously imposed sentence on an unrelated charge. Thus, there was never a connection between the Sauk County case and Smith's custody, so no additional credit is required.[35]

Concurrent Sentence Example 4

Smith is arrested and charged on the same day in two separate cases, A and B, each arising from a different course of conduct. Unable to post cash bail, he remains in custody. Ninety days after his arrest he is convicted and sentenced in Case A. Sixty days later he is convicted and sentenced in Case B. The sentence is ordered to run concurrently with the sentence in Case A.

The sentencing in Case A severed the connection between Smith's custody and Case B. Thus, his custody after the first 90 days was due solely to the sentence in Case A, and the judgment of conviction in Case B should give credit only for the first 90 days.[36]

Concurrent Sentence Example 5

Smith was convicted of burglary and sentenced to five years of imprisonment, but execution of the sentence was stayed and he was placed on probation. He committed another burglary while on probation and was taken into custody. A probation hold was imposed, and bail, which he could not post, was set on the new charge. He was convicted of the new charge and sentenced to five years of imprisonment, to run concurrently with the sentence underlying the probation, as probation had been revoked at the same time. He spent 180 days in custody.

The judgment of conviction on the new charge should order that credit be granted for 180 days spent in custody. The department's revocation order should also reflect that 180 days credit is due on the sentence underlying the revoked probation.

When the judgment and the revocation order reach the prison, the registrar will credit each sentence with 180 days, by computing each sentence as though it had begun 180 days earlier.

(NOTE: This example assumes that no credit was due on the sentence underlying the probation for time spent in custody prior to the original sentencing on that charge. If such credit was due, it should be reflected on the original judgment of conviction and in

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the revocation order and would be credited by the registrar against only the first sentence.)

> Concurrent Sentence Example 6
> Smith was convicted of burglary; sentence was withheld and he was placed on probation. He committed another burglary while on probation and was taken into custody. A probation hold was imposed, and bail, which he could not post, was set on the new charge. His probation was revoked and after 180 days in custody he was sentenced after revocation to four years of imprisonment. Ninety days later he was convicted of the new burglary charge and sentenced to four years of imprisonment, to run concurrently with the four-year sentence imposed for the first burglary.

The judgment of conviction on the new burglary charge should order that credit be granted for 180 days spent in custody before being sentenced after revocation for the first burglary. Smith is not entitled to the additional 90 days he was in custody after the sentencing in the first case because that sentencing severed the connection between his custody and the new charge.[37]

While the credit on each judgment will be equal, the second sentence will control Smith's release date because as of the date of sentencing in the second case, he had served 90 more days of the first sentence.

(NOTE: This example also assumes that no credit was due on the sentence underlying the probation for time spent in custody prior to the original sentencing on that charge. If such credit was due, it should be reflected on the original judgment of conviction and in the revocation order and would be credited by the registrar against only the first sentence.)

> Concurrent Sentence Example 7
> While Smith is on extended supervision he is arrested for a new offense. He is held in custody on an ES hold and on cash bail on the new offense. Three months after his arrest his ES is revoked, and a month after revocation, he is returned to the prison system to commence reconfinement time. Two months after being returned to prison he is convicted and sentenced for the new offense and given a concurrent sentence.

The offender's custody was connected to both the ES case and the new offense until the time he was returned to prison. The return to prison severed the connection between the offender's custody and the new offense. Because the sentence for the new offense is concurrent, however, the offender is entitled to credit toward that sentence for the time between his arrest and his return to prison.[38]

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Whether an offender subject to multiple charges or revocations awaits resolution of pending matters in jail or prison, whether cases are resolved at the same time or at wide intervals, or whether one case or the other is first resolved is often fortuitous. Practices differ from county to county, based on local court calendars, whether the offender will waive revocation or plead guilty, and even whether the local detention facility has available space.[39] These practices may result in disparate results in similar cases or may allow "persons to manipulate the system to their advantage" (as by delaying the revocation of probation, parole, or extended supervision).[40] Trial courts should be as fully informed as possible about each case so that unfair results can be avoided. If different judges are involved, it will be unlikely that each judge will be aware of the sentence credit situation in the other case when completing his or her own judgment, but the judge imposing the second sentence should try to become informed of the credit awarded against the first sentence.

d. Concurrent sentences imposed after revocation of probation and revocation of a deferred entry of judgment agreement

Concurrent Sentence Example 8

Smith is arrested and charged with a felony and two misdemeanors arising out of the same course of conduct. He is placed on probation for the misdemeanors and is subject to a deferred entry of judgment agreement on the felony, and is free on bond with respect to the felony. He is later taken into custody and placed on a probation hold, and both probation and the deferred entry of judgment agreement are revoked. After being in custody for 75 days on the hold and while awaiting revocation of probation, he is sentenced after revocation on the misdemeanors and sentenced on the felony. The court imposes concurrent sentences on all three counts.

The judgment of conviction should indicate that Smith is entitled to 75 days of credit on all three sentences even though he was not on probation for the felony because the custody was in connection for the course of conduct for which all three sentences were imposed.[41]

Note that if the felony arose from a course of conduct different from that of the misdemeanors, the custody for any probation hold, or while awaiting probation, revocation would not be connected to the felony unless the bond on the felony was revoked or amended in a way that also kept the person in custody.

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2. Consecutive sentences

The objective with consecutive sentences is to assure that credit is awarded against one, but only one, of the consecutive sentences.[42] In situations where consecutive sentences are imposed by different judges, there will have to be some communication between the two courts to assure that sentence credit is properly ordered. This can most easily be achieved by requiring the parties to come to the sentencing hearing prepared to identify any sentence credit awarded on any previously imposed sentences.

Examples of common consecutive sentence situations follow.

a. Multiple counts in a single judgment

Consecutive Sentence Example 1
Smith was arrested for two armed robberies, charged in a two-count information, and convicted of both charges on the same day. He spent one year in jail awaiting disposition. He is sentenced to serve 10 years of imprisonment on each count, the sentences to run consecutively to one another. The judgment of conviction should order that 365 days credit be granted.

If an offender with multiple charges is entitled to credit that is applicable to all of the charges and is given an imposed sentence on one charge and a consecutive imposed and stayed sentence on the others, the credit must be awarded against the first imposed sentence.[43]

b. Sentence to run consecutively to a sentence imposed by another court

Consecutive Sentence Example 2
Smith is arrested for an armed robbery in Dane County. An armed robbery charge is already pending in Sauk County, but Smith had been released on bail. He spends one year in Dane County jail awaiting trial and is then convicted and sentenced to 10 years of imprisonment, with sentence credit ordered for the one year he spent in jail. He pleads guilty to the Sauk County charge and is sentenced to 10 years of imprisonment, to run consecutively to the Dane County charge. Sauk County had lodged a detainer against Smith in Dane County.

The Dane County judgment should order that credit be granted for the 365 days spent in Dane County jail. When the sentencing takes place in Sauk County, the judge must be informed of the sentence and sentence credit ordered in the Dane County judgment. This

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should be done by the parties, who should come to the Sauk County sentencing prepared to address the sentence credit issue, ideally with a copy of the Dane County judgment.

The Sauk County judge would not order credit for the time spent in custody in Dane County, even though that custody may have been due in part to the Sauk County detainer, because the detainer is insufficient to establish a connection between the Dane County custody and the Sauk County case.[44] When the defendant reaches the institution, his total sentence will be computed as though it had begun 365 days earlier.

(NOTE: There may be other periods of custody allocable solely to the Sauk County case for which credit may be due in the Sauk County judgment.)

c. Multiple sentences with differing amounts of credit

Consecutive Sentence Example 3
Roberts is arrested for a theft and, after remaining in custody for 30 days, is released on bail. He is later arrested for a burglary and remains in custody until he is sentenced in both cases 60 days later. He is sentenced to two years of imprisonment for the theft and six years of imprisonment for the burglary, to run consecutively to the theft sentence.

The judgment of conviction for the theft conviction should include 30 days of sentence credit, while the judgment of conviction for the burglary conviction should order 60 days of sentence credit. Thus, the total consecutive sentences of eight years are reduced by the total of 90 days Roberts spent in custody before sentencing on the two cases.

d. Sentence to run consecutively to a sentence imposed following revocation of probation

Consecutive Sentence Example 4
Smith was convicted of armed robbery in 2010 and placed on probation; sentence was withheld. He was entitled to no sentence credit as a result of that episode. In 2011, he commits another armed robbery. A probation hold is filed against him and he is charged with the new offense. He spends one year in jail awaiting trial and revocation. He is sentenced on the new charge first and receives a 10-year sentence, with credit ordered for the one year. He then comes before the judge who imposed the original probation. A 10-year consecutive sentence is imposed.

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The judgment imposed first should order credit for the one year spent in custody. The judge imposing the sentence following revocation of probation must be informed about the sentence and sentence credit ordered in the first judgment and should order no credit for time spent in custody that was awarded as credit on the first judgment.

(NOTE: If Smith had received an imposed and stayed sentence originally, or was on parole or extended supervision, the Department of Corrections would give credit on the stayed sentence or the sentence for which Smith was on parole or extended supervision for all time in custody on the new offense until the person is received at or returned to prison. Thus, in these circumstances, the judge who imposes a consecutive sentence on the new offense (which was the basis for revoking probation, parole, or extended supervision) should not grant credit for any custody on the new offense.[45])

VI. Correcting Sentence Credit Errors[46]

Since the effective date of § 973.155 in 1978, it has been required that the sentence credit determination be made part of the judgment of conviction as a finding by the court. If a determination was not made in the judgment, past practice has been to first petition the department for credit. When a determination has been made part of the judgment, any change in that determination requires an amendment of the judgment. While administrative change of the sentence credit finding might be more convenient, a finding in a judgment simply may not be amended by administrative action.

In cases where court action is required to correct a judgment, the correction process need not be a cumbersome one. First, courts should require accurate information at the time of sentencing and impress upon the parties the importance of making a correct determination initially. Second, the correction process can be simple and efficient. A number of different procedural designations could be applied to the request for correction. Regardless of how the request is categorized, it should follow the general format described below.

1. An application to correct the sentence credit determination should be made in the sentencing court.

2. The application should specify the additional credit that is being requested – *e.g.*, to change the sentence credit determination from 50 to 75 days.

3. The application should specify the nature of each separate period of custody for which credit is being claimed – *e.g.*, 10 days in the Wood County jail after arrest and before transfer to Dodge County; 15 days in a mental health facility while competency to stand trial was being evaluated.

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4. The application should identify the reason for each period of custody and must show that it was "connected with the course of conduct for which sentence was imposed."

5. Attached to the application should be confirmation by the person having custody of the offender for each period which verifies both the duration and the reason for the custody.

6. A copy of the application should be sent to the district attorney.

7. A hearing is not required but may be ordered in the discretion of the court.

8. If the sentence credit determination is corrected, an amended judgment should be prepared which reflects the proper sentence credit. The amended judgment should be promptly sent to the institution having custody of the offender.

It may happen that an error in the initial determination of sentence credit is not discovered and corrected until after an offender has served the custody portion of the sentence and has been released on parole or extended supervision. The judgment of conviction should still be amended because the additional credit reduces the offender's sentence and, therefore, the amount of time remaining on parole or extended supervision. The amended judgment should be sent to the records office of the Department of Corrections' Division of Community Corrections, which is responsible for supervision of offenders on parole or extended supervision.

The judgment should also be amended even if the error is not discovered and corrected until after the offender's parole or extended supervision has been revoked and the offender reincarcerated under § 302.11(7) or reconfined under § 302.113(9). The additional credit must be applied to reduce the length of reincarceration or reconfinement the offender serves as well as the total length of the remaining sentence.[47]

9. If the application to correct the sentence credit determination is denied, an order to that effect should be entered, and a copy sent to the person who filed the application.

COMMENT

SM-34A was originally published in 1982 and revised in 1985, 1988, 1991, 1995, 2013, 2016, 2018, and 2019. This revision was approved by the Committee in December 2019; it involved a review and revision of the text and footnotes.

1. State v. Carter, 2010 WI 77, ¶51, 327 Wis.2d 1, 785 N.W.2d 516 (quoting State v. Ward, 153 Wis.2d 743, 745, 452 N.W.2d 158 (Ct. App. 1989), and State v. Beets, 124 Wis.2d 372, 379, 369 N.W.2d 382 (1985)). Also see, State v. Obriecht, 2015 WI 66, ¶23, 363 Wis.2d 816, 867 N.W.2d 387.

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2. The exception is that when a court imposing a life sentence establishes a specific date for parole eligibility under § 973.014(1)(b), time spent in custody prior to sentencing is not credited against that parole eligibility date. State v. Chapman, 175 Wis.2d 231, 499 N.W.2d 222 (Ct. App. 1993). While the court may consider the amount of credit as a factor in setting the eligibility date, the date set by the court governs. State v. Seeley, 212 Wis.2d 75, 83-88, 567 N.W.2d 897 (Ct. App. 1997).

Section 973.014(1)(b) applies only to offenses committed before December 31, 1999, when Truth-in-Sentencing took effect. However, the Truth-in-Sentencing legislation created § 973.014(1g)(a)2., which allows a court imposing a life sentence for an offense committed on or after December 31, 1999, to set a date on which the person is eligible to petition for supervised release under § 302.114(5). No published decision has addressed whether time spent in custody before sentencing should be credited against the extended supervision eligibility date set by a court, but the Committee concludes that under the rationales of Chapman and Seeley the time in custody would not be credited.

3. State v. Obriecht, 2015 WI 66, ¶23, 363 Wis.2d 816, 867 N.W.2d 387.

4. State v. Villalobos, 196 Wis.2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995).

5. Note that the statute qualifies this listing of three periods of time with the phrase "without limitation by enumeration." Thus, periods of time not listed may be creditable under § 973.155.

6. In State v. Walker, 117 Wis.2d 579, 345 N.W.2d 413 (1984), the Wisconsin Supreme Court identified the procedure that should be followed: The appropriate sentence is to be determined independently of any time previously served; only then should sentence credit be determined. For a more complete discussion see note 15, SM-34, Sentencing Procedure, Standards, And Special Issues (© 1999).

The awarding of sentence credit is a judicial function that requires a court to reach its own conclusion about the amount of sentence credit to be awarded and to explain its findings and reasoning on the record. While the court may seek assistance from its court clerk in collecting information that may be relevant to the credit determination, the awarding or denial of sentence credit is the duty of the court, not the court clerk. State v. Kitt, 2015 WI App 9, 359 Wis.2d 592, 859 N.W.2d 164.

7. Section 973.03(4)(b) expressly provides for sentence credit for periods of home detention.

8. In State v. Avila, 192 Wis.2d 870, 532 N.W.2d 423 (1995), the Wisconsin Supreme Court rejected the claim that principles of equal protection require that a period of jail time ordered as a condition of probation be reduced to reflect time spent in jail prior to trial because of indigency. The court also rejected the defendant's claim that his condition of probation jail time should be credited for prison time served pursuant to a conviction later reversed. The court held that the applicable statute, § 973.04, applied only to credit against subsequent "sentences" and that jail time as a condition of probation is not a sentence. Avila did not involve a claim that § 973.155 applied, but the same result should follow: that statute also requires credit only against "sentences"; time in jail ordered as a condition of probation is not a "sentence."

9. State v. Obriecht, 2015 WI 66, ¶24, 363 Wis.2d 816, 867 N.W.2d 387.

10. State v. Wolfe, 2001 WI App 66, 242 Wis. 2d 426, 625 N.W.2d 655. See also § 973.155(3) (computing custody as if it were served time in the institution to which the defendant has been sentenced).

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11. State ex rel. Thorson v. Schwarz, 2004 WI 96, ¶¶16-29, 274 Wis.2d 1, 681 N.W.2d 914, held that a person detained or committed under Chapter 980 is not in "custody" for purposes of § 973.155. In 2005 Wis. Act 434, § 45, however, the definition of "custody" under the escape statute was amended to cover detention under Chapter 980. See § 946.42(1)(a)1.a. and 1.e. (referring to facilities under §§ 980.04(1) and 980.065 and to supervised release under Chapter 980). The amendments to § 946.42(1)(a) took effect August 1, 2006. Thus, as of that date, a person detained or committed under Chapter 980 is in "custody" for purposes of § 973.155, effectively superseding Thorson's holding to the contrary. Note, however, that Thorson also held a person's custody under Chapter 980 is not "in connection with" the predicate offense for the commitment; that holding is not changed by the amendments to the definition of "custody" in § 946.42. See note 23, below.

12. Credit is to be granted for time spent in jail as a condition of probation based both on the holding in State v. Gilbert, 115 Wis.2d 371, 340 N.W.2d 511 (1983), and on the fact that 1995 Wis. Act 154 amended the definition of "custody" in § 946.42(1)(a) to include custody in jail as a condition of probation. As to bail release, note that §§ 969.02(3)(d) and 969.03(1)(e) allow a court to set a condition of bail release that requires a defendant to return to custody after specified hours.

13. Credit should be granted when, for example, a Wisconsin offender is arrested in Illinois on a Wisconsin warrant even if the offender is also being held on Illinois charges, unless or until the offender begins serving a sentence on the Illinois charges. State v. Carter, 2010 WI 77, ¶¶31-40, 58-72, 82, 327 Wis.2d 1, 785 N.W.2d 516. Credit should not be granted when a Wisconsin offender, already in custody on Illinois charges, has a Wisconsin "hold" or detainer filed against him. This is consistent with the conclusion that filing a detainer against one already in custody in Wisconsin does not result in "custody" under § 973.155 on the charge which is the subject of the detainer. See note 24, below.

A prior version of SM-34A (© 1995) stated that a person was in "custody" in another state only if his or her custody was based exclusively on a Wisconsin warrant. This conclusion was rejected in State v. Carter, 2007 WI App 255, ¶¶11-25, 306 Wis.2d 450, 743 N.W.2d 700, aff'd, 2010 WI 77, ¶40, 327 Wis.2d 1, 785 N.W.2d 516, and was removed in the 2014 version of SM-34A.

14. State v. Baker 179 Wis.2d 655, 508 N.W.2d 40 (Ct. App. 1993).

15. State v. Sevelin, 204 Wis.2d 127, 554 N.W.2d 521 (Ct. App. 1996). Credit is not required where jail time as a condition of probation is stayed and the person is hospitalized for treatment. State v. Edwards, 2003 WI App 221, 267 Wis.2d 491, 671 N.W.2d 371.

16. A person required to remain in his home during all nonworking hours as a condition of bail pending appeal, is not entitled to credit for the period of home detention on the sentence imposed after the appeal was decided. State v. Pettis, 149 Wis.2d 207, 441 N.W.2d 247 (Ct. App. 1989).

17. See the discussion of State v. Cobb, 135 Wis.2d 181, 400 N.W.2d 9 (Ct. App. 1986). In Cobb, the court held that credit was properly denied to a probationer who was ordered, as a condition of probation, to spend either one year in jail or go to a drug abuse treatment center. He chose to participate in a drug treatment program and successfully completed it. When his probation was revoked, he sought credit for the time her spent in the program. The court held that credit was not required because there was no evidence of "custody" – defining that term, by reference to the escape statute, as "physical detention by an institution, institution guard or peace officer." 135 Wis.2d 181, 185. As discussed above in Section IV.A.1 and 2, after Cobb was decided the supreme court clarified that for purposes of sentence credit

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"custody" is defined not solely by physical detention, but by whether the offender is subject to an escape charge for leaving whatever status or setting her or she was in. Magnuson, 233 Wis.2d 40, ¶31.

18. In State v. Harris 168 Wis.2d 168, 483 N.W.2d 808 (Ct. App. 1992), the court held that there was no authority to grant credit for time served in a home detention program ordered under the auspices of a federal consent decree.

19. State ex rel. Simpson v. Schwarz, 2002 WI App 7, 250 Wis.2d 214, 640 N.W.2d 527.

20. State v Friedlander, 2019 WI 22, 385 Wis.2d 612, 923 N.W.2d 849. Friedlander sought credit for time he spent in the community after he was released from a prison sentence when he should instead have been transferred to a county jail to serve time as a condition of probation in another case. The court of appeals concluded that Friedlander was entitled to credit for the time he was in the community through no fault of his own, citing State v. Riske, 152 Wis. 2d 260, 448 N.W.2d 260 (1989), and State v. Dentici, 2002 WI App 77, 251 Wis. 2d 436, 643 N.W. 2d 180. Riske and Dentici held that a defendant who reported to jail to serve a sentence but was turned away due to overcrowding was entitled to credit for the time he was at liberty. The decisions adopted an equitable doctrine recognized in other jurisdictions that a person erroneously released from custody continues to serve his or her sentence.

The supreme court reversed the court of appeals' grant of credit to Friedlander and overruled Riske and Dentici. The supreme court concluded that Riske and Dentici are inconsistent with the bright-line rule that a person must be subject to an escape charge to be in "custody" for the purposes of § 973.155. Under that rule, it is irrelevant to a sentence credit determination that a person was at liberty through no fault of his or her own. Friedlander, 385 Wis. 2d 612, ¶¶24-42.

21. A defendant held "in part" on unsatisfied cash bail on the principal charge and an unrelated charge was in custody in connection with the principal charge up until disposition of the unrelated charge. State v. Harr, 211 Wis.2d 584, 596-97, 568 N.W.2d 307 (Ct. App. 1997). Harr applied State v. Gavigan, 122 Wis.2d 389, 362 N.W.2d 162 (Ct. App. 1984) (citing a prior version of SM-34A) and State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985) (approving the reasoning in Gavigan).

In some cases a person facing multiple charges arising out of the same course of conduct may be placed on probation for some of the charges and be subject to deferred entry of judgment agreement on other of the charges. If the person is taken into custody on a probation hold, that custody is also considered to be in connection with the charge that is subject to the deferred entry of judgment agreement. State v. Zahurones, 2019 WI App 57, ¶¶13-17, 389 Wis. 2d 69, 934 N.W.2d 905.

See also State v. (Elandis) Johnson, 2009 WI 57, ¶27, 318 Wis.2d 21, 767 N.W.2d 207 (in deciding whether an offender is entitled to credit under § 973.155, the court must determine whether the person was in custody and "whether all or part of the 'custody' for which credit is sought was 'in connection with the course of conduct for which sentence was imposed'"); State v. Hintz, 2007 WI App 113, ¶8, 300 Wis.2d 583, 731 N.W.2d 646 (credit must be awarded under § 973.155(1)(b) for time in custody on an extended supervision hold if the hold was "at least in part" due to the conduct resulting in the new conviction). Cf. State v. Thompson, 225 Wis.2d 578, 593 N.W.2d 875 (Ct. App. 1999) (offender was in custody in connection with an adult charge while confined under a juvenile commitment because the adult charge led to revocation of juvenile supervision and confinement in juvenile facility).

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In State v. (Marcus) Johnson, 2007 WI 107, 304 Wis.2d 318, 735 N.W.2d 505, the defendant argued for a broad interpretation of the "in connection with" language in § 973.155 based in part on the statement in the paragraph to which this note is appended that custody "must be, at least in part, the result of a legal status . . . stemming from the course of conduct for which sentence is being imposed." Id., ¶68. The supreme court rejected Johnson's "expansive interpretation" as contrary to applicable case law, in particular State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985), where, once the offender began serving a sentence on one charge, it was irrelevant that he was also awaiting trial on another charge. Id., ¶69. Because SM-34A discusses and incorporates the holdings of the applicable case law, including Beets, the Committee concluded the court's rejection of Johnson's argument did not require a revision of the language of SM-34A.

22. State v. Beiersdorf, 208 Wis.2d 492, 498, 561 N.W.2d 749; (Ct. App. 1997); State v. Floyd, 2000 WI 14, ¶¶15-17, 232 Wis.2d 767, 606 N.W.2d 155; State v. (Elandis) Johnson, 2009 WI 57, ¶33, 318 Wis.2d 21, 767 N.W.2d 207. See also State ex rel. Thorson v. Schwarz, 2004 WI 96, ¶34, 274 Wis.2d 1, 681 N.W.2d 914, which held that time spent in the Wisconsin Resource Center pending a Chapter 980 commitment trial is not "in connection with" the sentence on a criminal offense that served as one of the predicates for the Chapter 980 petition.

23. State v. (Elandis) Johnson, 2009 WI 57, 318 Wis.2d 21, 767 N.W.2d 207. See also note 34, below.

24. "Custody" as used in § 973.155 must result "from the occurrence of a legal event, process, or authority which occasions, or is related to, confinement on the charge for which the defendant is ultimately sentenced." State v. Demars, 119 Wis.2d 19, 26, 349 N.W.2d 708 (Ct. App. 1984) (communication of a detainer which carried no custodial mandate was not sufficient to establish connection with the case in which the detainer was filed); State v. Nyborg, 122 Wis.2d 765, 768, 364 N.W.2d 553 (Ct. App. 1985) (same); State v. Villalobos, 196 Wis.2d 141, 147-48, 537 N.W.2d 139 (Ct. App. 1995) (entry in a jail log indicating an outstanding arrest warrant from another county was not "occurrence of a legal event, process, or authority" sufficient to establish connection between basis for custody and charges for which warrant was issued). Cf. State v. Carter, 2007 WI App 255, ¶¶14-18, 306 Wis.2d 450, 743 N.W.2d 700, aff'd as modified as to number of days of credit granted, 2010 WI 77, ¶¶9, 33-34, 81-82, 327 Wis.2d 1, 785 N.W.2d 516 (arrest of defendant in Illinois on Wisconsin warrant established a connection between custody and Wisconsin course of conduct).

25. State v. Gavigan, 122 Wis.2d 389, 393, 362 N.W.2d 162 (Ct. App. 1984) (citing a prior version of SM-34A). The reasoning in Gavigan was approved by the supreme court in State v. Beets, 124 Wis.2d 372, 380-81, 369 N.W.2d 382 (1985). See also State v. Carter, 2010 WI 77, ¶37, 327 Wis.2d 1, 785 N.W.2d 516 ("...once a defendant is actually serving the sentence on a charge, the defendant is not entitled to credit for presentence custody toward sentences on unrelated charges, although trial may be pending on the separate charges at the time the defendant is serving the first sentence.").

26. An offender's custody may preclude establishment of a connection with a course of conduct even if the custody is not due to service of a criminal sentence. In State v. Riley, 175 Wis.2d 214, 498 N.W.2d 884 (Ct. App. 1993), the defendant escaped from jail confinement ordered as a condition of probation. He was eventually arrested after committing a new crime during the period of escape. He was returned to jail to continue serving the original condition-of-probation confinement and cash bail was set on the new charge, which Riley did not post. At the completion of the condition of probation confinement, Riley was sentenced on the new charge. The court of appeals held that credit for the time

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spent in jail as a condition of the original probation was not due against the new sentence because § 973.155 "does not authorize credit for a term of confinement ordered [as a consequence] for prior criminal activity irrespective of whether that confinement is a condition of probation or as the result of a sentence after revocation of probation." Id., 220-21, citing State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985). See also State v. Villalobos, 196 Wis.2d 141, 144-46, 537 N.W.2d 139 (Ct. App. 1995) (applying Riley to similar facts).

Further, a defendant already in custody under a juvenile commitment was not entitled to credit toward an adult battery charge he committed while confined in a juvenile correctional institution based on a previous unrelated delinquency adjudication. State v. (Marcus) Johnson, 2007 WI 107, 304 Wis.2d 318, 735 N.W.2d 505. Because Johnson's juvenile commitment order pre-existed the battery charge, it precluded the creation of a connection between Johnson's custody and the battery charge. Id., ¶63. Nor was a connection created when Johnson's commitment was later extended based in part on the conduct giving rise to the battery charge because, the court concluded, the commitment would have been extended even if the battery had not occurred. Id., ¶71. The court distinguished State v. Thompson, 225 Wis.2d 578, 593 N.W.2d 875 (Ct. App. 1999), [cited above, in note 18,] on the grounds that Thompson's custody was both connected to the new charge, which had been a basis for the revocation of juvenile supervision, and was for treatment in the juvenile system, not continuing punishment of the original offense. Id., ¶¶45-55.

Note, however, that custody under a civil commitment for contempt does not preclude a connection between the custody and a pending criminal charge. Unlike a person serving a sentence, as in Beets, jail time as a condition of probation, as in Riley, or a juvenile commitment, as in (Marcus) Johnson, a person confined under a civil contempt commitment would not necessarily be in custody absent the pending criminal charge because the person may obtain release by meeting the contempt commitment's purge conditions. State v. Trepanier, 2014 WI App 105, ¶¶20-21, 357 Wis.2d 662, 855 N.W.2d 465.

27. In State v. Beiersdorf, 208 Wis.2d 492, 561 N.W.2d 749 (Ct. App. 1997), the defendant posted a personal recognizance bond on a sexual assault charge and remained on that bond until his sentencing. He was, however, held in custody on cash bond on later charges of bail jumping based on violations of the recognizance bond in the sexual assault case. He was sentenced to prison on the sexual assault charge; his sentence on the bail jumping charge was imposed and stayed and he was placed on probation, to run consecutively to the prison sentence for sexual assault. The court of appeals concluded Beiersdorf was in custody only "in connection with" the course of conduct for which sentence was imposed and stayed. Thus, no credit is due on the prison sentence for sexual assault.

28. State v. Gavigan, 122 Wis.2d 389, 362 N.W.2d 162 (Ct. App. 1984) (discussed in detail in note 34, below); State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985) (discussed in detail in note 35, below). While sentencing on one charge may be the most common event that will sever the connection, it is not the only one. In State v. Harr, 211 Wis.2d 584, 596, 568 N.W.2d 307 (Ct. App. 1997), the court concluded that the offender's commitment under § 971.17 after being found not guilty by reason of mental disease or defect severed the connection between his custody and an unrelated pending charge.

Not every event that creates an independent basis for legal custody "severs" the connection between an offender's custody and a pending criminal case. To sever the connection, the event must have put the offender in a status that would keep the offender in custody even in the absence of the criminal case. For instance, in State v. Trepanier, 2014 WI App 105, 357 Wis.2d 662, 855 N.W.2d 465, an offender who was already in custody on cash bail in a criminal case was found in contempt for failing to pay a fine in an

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unrelated case and ordered to be held in custody under the contempt order unless he met the purge condition. The subsequent contempt order did not sever the connection between the custody and the criminal case because, unlike the offender in Beets, who would have been in custody under the sentence imposed even in the absence of the pending criminal case, Trepanier could have obtained release from the contempt order by satisfying the purge conditions. Id., ¶¶15-21.

In addition, being on bond on a charge that is subject to a deferred entry of judgment agreement does not "sever" the connection between that count and other counts in the case for which the person is placed on probation. State v. Zahurones, 2019 WI App 57, ¶¶18-28, 389 Wis. 2d 69, 934 N.W.2d 905.

29. State v. Floyd, 2000 WI 14, ¶32, 232 Wis.2d 767, 606 N.W.2d 155. The court in Floyd disclaimed reliance on the "in connection with the course of conduct" language in § 973.155 and instead relied on the phrase "related to an offense for which sentence was imposed," finding the unique nature of read-in offenses made them "related" to offenses for which a defendant is sentenced for purposes of § 973.155(1).

Floyd limits its holding to offenses that are "read in" for sentencing purposes. 232 Wis.2d 767, ¶30. Thus, Floyd does not require credit to be given for custody related to every offense that a judge "considers" at sentencing. See State v. Piggue, 2016 WI App 13, 366 Wis.2d 605, 875 N.W.2d 663. In Piggue, the defendant was in custody on a sexual assault charge when he tried to persuade the victim not to testify against him. He was acquitted of the sexual assault, but was then charged with and convicted of witness intimidation. The judge considered the sexual assault allegations when sentencing Piggue on the intimidation charge, so Piggue argued that Floyd required the time he spent in custody on the sexual assault charges to be credited toward the intimidation sentence. The court of appeals held that Floyd should not be extended beyond its express limitation to "read-in" offenses. 366 Wis.2d 605, ¶¶12-13.

30. As noted above, in Section IV.B.2 of this Special Material, once a person begins serving one of the sentences, his "custody" is no longer "in connection with" the other pending charge. Credit on the sentence for that pending charge will be due only for the days when both charges were pending, prior to the commencement of the other sentence. State v. Beets, 124 Wis.2d 372, 369 N.W.2d 352 (1985). For cases applying Beets to offenders who are revoked from extended supervision for new charges and given a sentence on the new charges concurrent to the sentence on which supervision was revoked, see State v. Hintz, 2007 WI App 113, 300 Wis.2d 583, 731 N.W.2d 646; State v. Presley, 2006 WI App 82, 292 Wis.2d 734, 715 N.W.2D 713; and State v. Davis, 2017 WI App 55, 377 Wis.2d 678, 901 N.W.2d 488. This situation is discussed below, Section V.C.1.c, this Special Material. For a discussion of credit in consecutive sentence situations, see below, Section V.C. (intro.) and 2, this Special Material.

31. The defendant in Tuescher won a new trial on an attempted homicide charge arising out of an incident involving a burglary and shooting. The attempted homicide conviction was reversed, and while it was being relitigated he remained in custody serving the sentences imposed for two other charges arising out of the incident. After he was convicted and sentenced again on the attempted homicide, Tuescher sought credit toward the new sentence for his time in custody between winning the new trial and being resentenced. The defendant was not entitled to the credit because during that time he was serving the sentences imposed on the charges which were not retried. 226 Wis.2d 465, 467.

32. See Wis. Stat. § 946.42(1)(a)1.h., and State v. Gilbert, 115 Wis.2d 371, 340 N.W.2d 511 (1983). The question of credit for time spent in jail as a condition of probation was an open one at the time

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SM-34A was originally published. That version recommended that credit be granted for such time. The Committee's conclusion was adopted in Gilbert, which held that the plain meaning of § 973.155 required that credit be given: "there is no basis for interpreting the statute as excluding custody as a condition of probation from the statute's coverage." 115 Wis.2d 371, 377.

Because jail time as a condition of probation is not a sentence, any "good time" the circuit court allowed the offender to earn while serving the conditional jail time is not eligible for sentence credit under 973.155(4); that statute provides for sentence credit to include "good time" only for sentences of one year or less. State ex rel Baade v. Hayes, 2015 WI App 71, 365 Wis.2d 174, 870 N.W.2d 478.

33. This principle was cited with approval and applied in State v. Ward, 153 Wis.2d 743, 452 N.W.2d 158 (Ct. App. 1989).

34. State v. (Elandis) Johnson , 2009 WI 57, ¶¶50-60, 318 Wis.2d 21, 767 N.W.2d 207, criticized a prior version of SM-34A (© 1995) that referred to crediting equally all concurrent sentences "imposed at the same time or for offenses arising from the same course of conduct." The court found this formulation "unfortunate" because it was "too broad" and had led to the belief that when concurrent sentences are imposed at the same time, any credit is to be applied against each of the sentences imposed regardless of whether the custody was factually connected to each sentence. Noting that the "unfortunate" passage was more understandable, if still inaccurate, when read in context with the examples in the Special Material, the court made it clear that any custody applied to any given sentence must also be factually connected to that sentence. Id., ¶¶61-68. As applied to Johnson's case, the court held:

> ¶47 Calculating the correct number of days that need to be credited to each of Johnson's concurrent sentences requires that we examine separately each sentence and the time spent in presentence custody "in connection with" each sentence. We cannot, as Johnson's argument attempts to do, conflate all the concurrent sentences imposed on the same day and make a credit determination as if there were only one overall sentence imposed.

The language criticized in (Elandis) Johnson was removed in the 2014 version of SM-34A.

35. When credit has been granted against an earlier sentence which was completely served before sentencing on a new offense, no credit against the new sentence is required. State v. Morrick, 147 Wis.2d 185, 432 N.W.2d 654 (Ct. App. 1988); State v. Amos, 153 Wis.2d 257, 280, 450 N.W.2d 503 (Ct. App. 1989); State v. Jackson, 2000 WI App 41, ¶19, 233 Wis.2d 231, 607 N.W.2d 338.

See also State v. Rohl, 160 Wis.2d 325, 466 N.W.2d 208 (Ct. App. 1991) (defendant not entitled to credit for time served in California while he was on Wisconsin parole because he had received full credit for the time toward the sentence he completed in California); State v. Martinez, 2007 WI App 225, 305 Wis.2d 753, 741 N.W.2d 280 (reaching the same conclusion with respect to time served in a federal institution); State v. Coles, 208 Wis.2d 328, 559 N.W.2d 599 (Ct. App. 1997) (a defendant who was sentenced on one count to a "time served" sentence that used all his pretrial credit was not entitled to any of that credit toward a sentence on a second count because the sentence on the second count was effectively consecutive).

36. State v. Gavigan, 122 Wis.2d 389, 362 N.W.2d 162 (Ct. App. 1984). Gavigan committed a robbery on September 15, 1982. About 24 hours later, he led police on a high speed chase that resulted in a charge of fleeing an officer. Thirty-nine days after his arrest, he pleaded guilty to the fleeing charge and

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was sentenced to six months in jail. One hundred and seven days later Gavigan was sentenced on the robbery – a three-year sentence to run concurrently with the six-month sentence on the misdemeanor. The trial judge gave 39 days credit on the three-year sentence.

Gavigan claimed he should also receive credit for the 107 days that followed the misdemeanor sentence but preceded the robbery sentence. The court of appeals affirmed the denial of credit for the 107 days, holding that the custody was not "in connection with" the robbery charge – it was attributable solely to the misdemeanor conviction.

37. See State v. Beets, 124 Wis.2d 372, 369 N.W.2d 352 (1985). Beets was convicted of drug offenses and placed on probation with sentence withheld. He was arrested on a burglary charge and held in custody for that charge. Within a few days, a probation hold was added. The hold was based on the burglary charge.

Seventy-eight days after his arrest, Beets' probation was revoked and two concurrent three-year sentences were imposed. He received credit for the 78 days and went to prison.

One hundred and ninety-two days after his prison sentence began, Beets was sentenced on the burglary. He received a three-year sentence concurrent with the sentence he was already serving. He received 78 days credit for the time spent in custody before the first sentence was imposed (when both the revocation and the burglary charge were pending).

Beets sought credit for the 192 days that elapsed after his first prison sentence began, while the burglary charge was pending.

The supreme court affirmed the trial court's denial of credit, holding that confinement after the first sentence was imposed could not be "in connection with" the pending burglary charge. Thus, § 973.155 does not require credit, because the charges resulting in the first sentence and the pending charges were not "related." The court stated that "unless the acts for which the first and second sentences are imposed are truly related or identical, the sentencing on one charge severs the connection between the custody and the pending charges." Id., 383.

The rule in Beets that sentencing on a related charge "severs the connection" was applied in State v. Abbott, 207 Wis.2d 624, 558 N.W.2d 927 (Ct. App. 1996). Abbott committed a battery while serving a sentence under the Division of Intensive Sanctions (DIS) program. He received a sanction of 89 days in jail. Later, he pled guilty to the battery and was sentenced. The court of appeals held Abbott was not entitled to credit on the battery sentence for time spent in jail for the DIS sanction. Any connection between the two sentences was severed when Abbott began serving the DIS sanction. See also State v. Hintz, 2007 WI App 113, ¶7 n.3, 300 Wis.2d 583, 731 N.W.2d 646 (applying Beets to offender revoked from extended supervision for new charges and given a sentence on new charges concurrent to sentence on which supervision was revoked).

However, Beets does not mean every sentencing "severs" the connection between custody and charges unrelated to the one on which the sentence is imposed. In State v. Yanick, 2007 WI App 30, 299 Wis.2d 456, 728 N.W.2d 365, the defendant was serving six months of confinement as a condition of probation for an OWI offense. While serving that condition time he was sentenced in an unrelated case. That sentence began running while he was serving condition time and was longer than the condition time.

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When his probation on the OWI was revoked, he was entitled to credit toward the revocation sentence for the condition time despite the fact much of that time was concurrent to the sentence in the unrelated case:

> ¶22 To the extent the State is suggesting that Beets holds that service of a sentence on crime A always "severs" time in custody owing to crime B for purposes of awarding sentence credit on the sentence for crime B, we disagree. Beets addressed a particular type of status--time in custody serving a sentence and awaiting disposition on a separate crime. Beets does not address service of a sentence and concurrent service of custody time pursuant to a disposition, which is the sort of concurrent custody time at issue here.

Because Yanick was ultimately sentenced for the OWI for which he was confined as a condition of probation, his custody was factually connected to the course of conduct for which sentence was imposed. See also State v. (Elandis) Johnson, 2009 WI 57, ¶¶42-44, 318 Wis.2d 21, 767 N.W.2d 207 (discussing Yanick).

Similarly, in a decision that does not refer to Beets or the "severance" concept, the court of appeals held in State v. (Kevin) Brown, 2006 WI App 41, 289 Wis.2d 823, 711 N.W.2d 708, that an offender should receive credit for time served in a federal institution after a Wisconsin sentence was imposed and the offender was taken into custody by federal authorities and sentenced to federal prison. The decision was based on § 973.15(5), which requires credit under § 973.155 when an offender convicted here is "made available" to the authorities of another jurisdiction. Section 973.15(5) effectively creates a connection between the offender's Wisconsin case and the custody in the other jurisdiction that cannot be severed by sentencing in the other jurisdiction.

38. State v. Hintz, 2007 WI App 113, 300 Wis.2d 583, 731 N.W.2d 646. Hintz asked only for confinement up to his reconfinement hearing, which for purposes of § 973.155 is essentially a sentencing hearing. See State v. Presley, 2006 WI App 82, 292 Wis.2d 734, 715 N.W.2d 713. Courts no longer determine the amount of reconfinement after revocation of extended supervision, so the reconfinement hearing is not the point at which the offender's sentence begins running again; instead the sentence resumes running when the person is returned to prison. Wis. Stat. § 304.072(4). State v. Davis, 2017 WI App 55, 377 Wis.2d 678, 901 N.W.2d 488.

39. Depending on the situations, sentences begin to run or resume running at different times.

a) Sentences to confinement commence on the date of imposition. Wis. Stat. § 973.15(1). This provision covers situations in which sentence was originally withheld and probation imposed.

b) Following revocation of probation in the imposed-and-stayed-sentence-probation-imposed case, the sentence commences when the offender arrives at the prison. The revocation date is irrelevant. Wis. Stat. § 973.10(2)(b).

c) Sentences of revoked parolees or persons on extended supervision resume running on the date the person is received at the correctional institution. Wis. Stat. § 304.072(4).

40. State v. Beets, 124 Wis.2d 372, 383, 369 N.W.2d 382 (1985).

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41. State v. Zahurones, 2019 WI App 57, 389 Wis.2d 69, 934 N.W.2d 905.

42. The Wisconsin Supreme Court approved of this general principle in State v. Boettcher, 144 Wis.2d 86, 423 N.W.2d 533 (1988), reversing 138 Wis.2d 292, 405 N.W.2d 767 (Ct. App. 1987). The essential dates and facts were as follows:

4/12/86	Boettcher, on probation with a three year stayed sentence, is arrested for a new offense; a probation hold is imposed.
4/22/86	Initial appearance on new charge; signature bond on new charge; probation hold remains in effect so Boettcher remains in custody.
7/23/86	Probation is revoked and the three year stayed sentence takes effect – on that sentence, credit for all days in custody from 4/12 through 7/23 (110 days) is awarded; sentence is imposed on new offense – 1 year to run consecutively to the other sentence – and no credit for time in custody is given.

The court of appeals held that additional credit should have been given on the sentence for the new crime for the 10 days between 4/12 and 4/22 – the time after arrest and before he was "released" on a signature bond for the new offense. (Of course, he was not released; he remained in custody on the probation hold.) The court reasoned that he was "in custody" on the new offense for this period and credit must be given against the eventual sentence on that offense. This is the case even though he received credit for that 10-day period on the other sentence resulting from the revoked probation.

The supreme court reversed the court of appeals, concluding "that dual credit is not permitted – that the time in custody is to be credited to the sentence first imposed – and that, where the sentences are consecutive, the total time to be served is thus reduced by the number of days in custody as defined by sec. 973.155, Stats. Credit is to be given on a day for day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively." 144 Wis.2d 86, 87.

This holding is consistent with SM-34A, which the court cited with approval:

> We agree with, and endorse, the position of the Wisconsin Criminal Jury Instructions Committee's language in SM-34A V.B., where, in discussing consecutive sentences, it concludes:
>
> "The objective with consecutive sentences is to assure that credit is awarded against one, but only one, of the consecutive sentences." 144 Wis.2d 86, 101.

The Boettcher rule also applies where a sentence has already been served: "The core idea of Boettcher is that 'dual credit is not permitted' where a defendant has already received credit against a sentence which has been, or will be, separately served." State v. Jackson, 2000 WI App 41, ¶19, 233 Wis.2d 231, 607 N.W.2d 338. See also State v. Coles, 208 Wis.2d 328, 334, 559 N.W.2d 599 (Ct. App. 1997) (a defendant who was sentenced on one count to "time served" in an amount equal to his pretrial credit was not entitled to any credit on the prison sentence imposed for a second count; the prison sentence was consecutive to the "time served" sentence because the "time served" sentence was completed upon pronouncement of sentence); State v. Rohl, 160 Wis.2d 325, 466 N.W.2d 208 (Ct. App. 1991) (applying Boettcher to deny defendant credit for time served in California while he was on

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Wisconsin parole before his Wisconsin parole was revoked; because his parole was not revoked until after he was released in California and returned to Wisconsin, his post-revocation Wisconsin sentence was consecutive, not concurrent, to the California sentence); State v. Martinez, 2007 WI App 225, 305 Wis.2d 753, 741 N.W.2d 280 (reaching the same conclusion with respect to time served in a federal institution before the person's Wisconsin parole was revoked).

Further, the Boettcher rule applies when one of several concurrent sentences is vacated and, after resentencing, is ordered to run consecutively to the previously imposed sentences with which it was originally running concurrent. State v. Lamar, 2011 WI 50, ¶¶35-37, 334 Wis.2d 536, 799 N.W.2d 758. Lamar was serving two concurrent sentences. He successfully challenged his conviction, but by the time he did so one of the sentences was finished. After he was reconvicted, the court imposed a new sentence, ordered it to run consecutively to any other sentence, and denied Lamar credit for the time he had served on the sentence that discharged before his conviction was vacated. The supreme court affirmed, holding "the time for which Lamar seeks credit was served on a separate, non-concurrent sentence. If Lamar received the sentence credit he seeks, he would receive dual credit from two consecutive sentences [for the same period of time]. As this court held in Boettcher, defendants are not entitled to receive this dual credit on a consecutive sentence." 334 Wis.2d 536, ¶37 (citing a previous version of this Special Material). The court also concluded that § 973.04 – which requires credit for confinement previously served when a sentence is vacated and a new sentence imposed – was not inconsistent with application of Boettcher and that denial of the credit did not violate the prohibition against double jeopardy. 334 Wis.2d 536, ¶¶35, 43-50.

Finally, the Boettcher rule applies to cases in which an offender is seeking credit against consecutive sentences for a period of pretrial custody in two separate cases. State v. Trepanier, 2014 WI App 105, ¶14, 357 Wis.2d 662, 855 N.W.2d 465. Trepanier was in custody in both a pending criminal case and a civil commitment for contempt. When he was sentenced in the criminal case the judge ordered the sentence to run consecutively to the civil commitment. Boettcher did not preclude awarding credit for the time Trepanier was in both pretrial custody for the criminal case and custody under the civil commitment because the custody for the civil commitment was not pretrial custody. Id., ¶¶12-14.

43. State v. Wolfe, 2001 WI App 66, 242 Wis.2d 426, 625 N.W.2d 655.

44. See note 23, above.

45. Note, however, that if supervision has not yet been revoked, ordering the credit for the new offense may be required. In State v. (Eliseo) Brown, 2010 WI App 43, 324 Wis.2d 236, 781 N.W.2d 244, the defendant was held in custody in connection with a Wisconsin case and an Illinois parole hold. He was sentenced in Wisconsin first, and given a sentence consecutive to any other sentence. The circuit court denied him credit for his custody time on the theory Illinois might grant it to him, and thus give him improper "double credit." The court of appeals held it must be applied to the Wisconsin sentence, as the question of "double credit" was not ripe because Illinois had not revoked his parole yet, and to deny credit on this sentence might mean he would never get it at all.

46. This section discusses the modification or correction of a sentence to reflect sentence credit where none, or an allegedly inadequate amount, had originally been given. See State v. Amos, 153 Wis.2d 257, 279-82, 450 N.W.2d 503 (Ct. App. 1989), for a case where a sentence was amended to eliminate sentence credit to which the defendant was not entitled.

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47. State v. Obriecht, 2015 WI 66, ¶¶33-36, 42-47, 363 Wis.2d 816, 867 N.W.2d 387. Obriecht addressed the application of credit to an offender reincarcerated under § 302.11(7), which governs parole revocation, but § 302.113(9), which governs extended supervision revocation, is essentially identical to § 302.11(7). Thus, the Committee concludes Obriecht's holding will also apply to offenders who have been reconfined under § 302.113(9).

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